1279 No. 3591 1280

United States

Circuit Court of Appeals

For the Ninth Circuit.

PHELPS DODGE CORPORATION, a Corporation,

Plaintiff in Error,

vs.

EPIFANIO GUERRERO,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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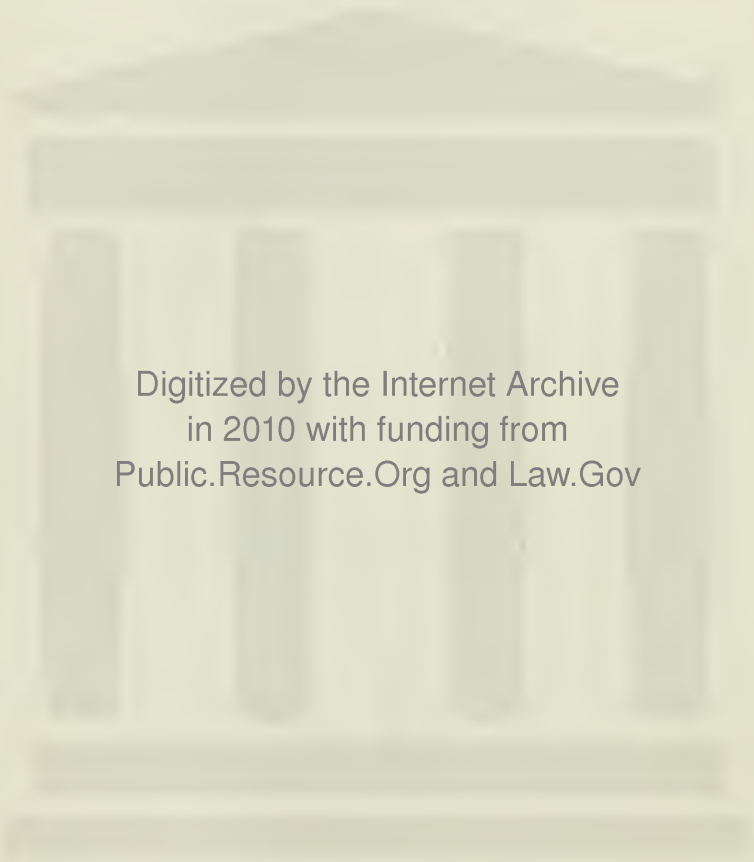

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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JAMES R. DUNSEATH, Esq., Tucson, Ariz.,
Attorneys for Defendant in Error.

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation (Morenci, Arizona Branch),

Defendant.

Complaint.

That plaintiff is a resident of the county of Greenlee, State of Arizona, and a citizen of the Republic of Mexico.

2.

Defendant is a corporation duly organized under the laws of the State of New York, and is a citizen of the State of New York; that defendant has filed the appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and in the office of the county recorder of said county of Greenlee; that it has filed its articles

of incorporation in the office of said corporation commission, and caused the same to be published for six issues in a newspaper published at said county of Greenlee, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business in the State of Arizona, and during the times and places herein mentioned it was, has been, and yet is, such corporation, engaged in the business of mining, smelting, conducting machine-shops, carpenter-shops, concentrator works, electric plants, railroading, and in other pursuits and industries, at the town of Morenci, county of Greenlee, State of Arizona, in its corporate name, Phelps Dodge Corporation.

3.

That prior to and on January 20th, 1919, and at the time the plaintiff received the injuries herein complained of, he was employed by and in the employment of the defendant. The defendant is the owner of a mine at Morenci, in said Greenlee County, which mine is commonly known as London mine; that in said mine on or about the 20th day of January, 1919, the plaintiff was employed as a miner [1*] by the defendant; that on said day while in said employment, while engaged in said work for the defendant, and while acting within the scope of his duties and while acting under said contract of employment as such employee of the defendant, the plaintiff received injuries to his eyes in said mine.

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*Page-number appearing at foot of page of original certified Transcript of Record.

4.

That the said injuries to plaintiff were occasioned by the condition and conditions of his said employment while working in the hazardous employment as a miner in defendant's said mine and in a stope or tunnel of defendant's said mine while underground; that the circumstances and conditions of said injuries and of said stope or tunnel were as follows:

That on or about January 20th, 1919, the plaintiff was employed as a miner and mucker, by the defendant, to break large rocks and boulders with a sledge-hammer into small pieces so the same could be removed from said mine, the plaintiff performing this work of breaking up said boulders in a stope of said mine for the defendant; that while engaged in his said work of breaking up boulders with a sledge-hammer, in a stope in said mine, under the directions of defendant and under said contract of employment, and as plaintiff was striking a boulder to break the same with a sledge-hammer, in the line of his duties as such employee, small particles of rock flew off from a boulder as plaintiff struck the same with a sledge-hammer and the same flew into and violently struck in his eyes, and as the said particles of rock struck the plaintiff into his eyes it produced in him weak, giddy and confused condition, and which said rock striking him in his eyes has ever since caused much injury to both his eyes, and has practically caused the loss of his left eye, and he has now as the result of said injury very faint vision in his left eye, and that said in-

jury has greatly disorganized his nervous system, and that on account of said injuries he has for a long time been compelled to be under treatment of a physician, and has necessarily spent large sums of money for travel to reach eye specialist for treatment and paid out considerable sums for doctor bills; that ever since said injuries he has been under [2] treatment of skilled physicians and surgeons, but has been unable to recover from said injuries, and that his conditions are such that he never will be able to recover from said injuries, and that as a direct result of said accident, he is greatly injured in body, mind and eyesight; that since said injuries he has not been able to perform any kind of work, and never will be able to follow his vocation as a miner or pursue gainful occupations, and that his said injuries are permanent; that ever since said injuries, and as a result thereof, he has suffered great mental and physical pain, and yet suffers and will continue to suffer pain. That said injury was an accident, and that said injuries and pains are the approximate result of said accident.

5.

That at the time of said injuries the plaintiff was engaged in manual and mechanical labor in the employment of the defendant as a miner underground in defendant's said mine; that said injuries were the result of an accident due to the condition of such occupation and of the place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff; that said injuries were the natural and proximate result of said

condition or conditions of the employment of said plaintiff within said mine and of the place of the performance of said work.

6.

That plaintiff at the time of his said injuries was 34 years of age, and was a skilled workman, and then earning wages of $4.30 per day, $111.80 per month of 26 days, and for the year $1,341.60, and capable of earning such wages within the line of his said employment, as such skilled worker; that he was strong, healthy, able-bodied, and never had had any sickness, and was intelligent and industrious; that his expectancy of life at the time of said injuries was 32.50 years; that since said injuries plaintiff has been unable to perform any kind of labor and has lost in wages on account of said injuries at the time of filing this complaint, $671.30.

That in view of said premises the plaintiff has been and is damaged in the sum of twenty thousand dollars, for which defendant is liable. [3]

7.

This action is prosecuted under the provisions of Chapter 6, Title 14, Civil Code of Arizona, known as the Employers' Liability Law.

WHEREFORE, plaintiff demands judgment against defendant for the sum of twenty thousand dollars, together with the cost of this action.

L. KEARNEY,
Attorney for the Plaintiff.

[Endorsements]: Epifanio Guerrero vs. Phelps Dodge Corporation, a Corporation (Morenci, Ari-

zona Branch). Complaint. Filed June 19th, 1919. Mose Drachman, Clerk. By Effie D. Botts, Deputy. [4]

In the District Court of the United States for the District of Arizona.

No. 219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Answer.

Comes now the above-named defendant, and answers the complaint of the above-named plaintiff herein as follows:

DEMURRER.

Answering said complaint, defendant demurs thereto, on the following grounds, to wit:

I.

That it appears upon the face of said complaint that this Court has no jurisdiction of the subject of this action.

II.

That it appears upon the face of said complaint that the same does not state facts sufficient to constitute a cause of action. [5]

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

PLEA IN BAR.

Further answering said complaint, but without waiving its foregoing demurrer, defendant admits the allegations of Paragraph II of said complaint, and denies each and every, all and singular, the remaining allegations in said complaint contained.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by this action, and for its costs.

ELLINWOOD & ROSS,
CLIFTON MATHEWS,
Attorneys for Defendant.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Answer. Filed July 14th, 1919. Mose Drachman, Clerk. [6]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation (Morenci, Arizona Branch),

Defendant.

Amended Complaint.

That plaintiff in this, his amended complaint, alleges that he is a resident of the county of Greenlee,

state of Arizona, and he is a citizen of the United States of the Republic of Mexico.

2.

Defendant is a corporation duly organized under the laws of the state of New York, and is a citizen of the state of New York; that defendant has filed the appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and in the office of the county recorder of said county of Greenlee; that it has filed its articles of incorporation in the office of said corporation commission, and caused the same to be published for six issues in a newspaper published at said county of Greenlee, and that it has fully complied with all the requirements of law pertaining to foreign corporations doing business in the state of Arizona, and during the times and places herein mentioned it was, has been, and yet is, such corporation, engaged in the business of mining, smelting, conducting machine-shops, carpenter-shops, concentrator works, electric plants, railroading, and in other pursuits and industries at the town of Morenci, county of Greenlee, state of Arizona, in its corporate name, Phelps Dodge Corporation.

3.

That prior to and on January 20th, 1919, and at the time the plaintiff received the injuries herein complained of, he was employed by and in the employment of the defendant. The [7] defendant is the owner of a mine at Morenci, in said Greenlee county, which mine is commonly known as the Lon-

don mine; that in said mine on or about the 20th day of January, 1919, the plaintiff was employed as a miner by the defendant; that on said day while in said employment, while engaged in said work for the defendant, and while acting within the scope of his duties and while acting under said contract of employment as such employee of the defendant, the plaintiff received injuries to his eyes in said mine.

4.

That the said injuries to plaintiff were occasioned by the condition and conditions of his said employment while working in the hazardous employment as a miner in defendant's said mine and in a stope or tunnel of defendant's said mine while underground; that the circumstances and conditions of said injuries and of said stope or tunnel were as follows:

That on or about January 20th, 1919, the plaintiff was employed as a miner and mucker, by the defendant, to break large rocks and boulders with a sledge-hammer into small pieces so the same could be removed from said mine, the plaintiff performing this work of breaking up said boulders in a stope of said mine for the defendant; that while engaged in his said work of breaking up boulders with a sledge-hammer, in a stope in said mine, under directions of said defendant and under said contract of employment, and as plaintiff was striking a boulder to break the same with a sledge-hammer, in the line of his duties as such employee, small particles of rock flew off from a boulder as

plaintiff struck same with a sledge-hammer and the same flew into and violently struck in his eyes, and as the said particles of rock struck the plaintiff into his eyes it produced in him weak, giddy and confused condition, and which said rock striking him in his eyes has ever since caused him much injury to both his eyes, and has practically caused him the loss of his left eye, and he has now as a result of said injury very faint vision in his left eye, and that said injury has greatly disorganized his nervous system, and that on account of said injuries he has for a long time been compelled [8] to be under treatment of a physician, and has necessarily spent large sums of money for travel to reach eye specialist for treatment and paid out considerable sums for doctor bills; that ever since said injuries he has been under treatment of skilled physicians and surgeons, but has been unable to recover from said injuries, and that his conditions are such that he never will be able to recover from said injuries, and that as a direct result of said accident he is greatly injured in body, mind and eyesight; that since said injuries he has not been able to perform any kind of work and as a proximate result of said injuries he is permanently incapacitated to perform the work of a miner or any other manual labor, whereby his capacity to labor and earn money has been greatly and permanently diminished; that ever since said injuries and as a result thereof he has suffered great mental and physical pain, and yet suffers and will continue to suffer pain. That said injury was an accident, and

that said injuries and pains are the approximate result of said accident.

5.

That at the time of said injuries the plaintiff was engaged in manual and mechanical labor in the employment of the defendant as a miner underground in defendant's said mine; that said injuries were the result of an accident due to the condition of such occupation and of the place where the plaintiff was at work; that said injuries were not caused by the negligence of the plaintiff, that said injuries were the natural and proximate result of said condition or conditions of the employment of said plaintiff within said mine and of the place of the performance of said work.

6.

That the plaintiff at the time of his said injuries was 34 years of age, and was a skilled workman, and then earning wages of $4.30 per day, $111.80 per month of 26 days, and for the year $1,341.60, and capable of earning such wages within the line of his said employment, as such skilled worker; that he was strong, healthy, able-bodied and never had any sickness, and was intelligent and industrious; that his expectancy of life at the [9] time of said injuries was 32.50 years; that since said injuries plaintiff has been unable to perform any kind of labor and has lost wages on account of said injuries at the time of filing this complaint $671.30.

That in view of said premises the plaintiff has been and is damaged in the sum of twenty thousand dollars, for which defendant is liable.

7.

This action is prosecuted under provisions of Chapter 6, Title 14, Civil Code of Arizona, known as the Employers' Liability Law.

WHEREFORE, plaintiff demands judgment against defendant for the sum of twenty thousand dollars; together with the costs of this action.

L. KEARNEY,
Attorney for the Plaintiff.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation (Morenci, Arizona Branch), Defendant. Amended Complaint. Filed March 3d, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy. [10]

In the District Court of the United States, for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Special Demurrer to Amended Complaint.

Comes now Phelps Dodge Corporation, defendant above named, and specially demurs to the amended complaint herein, on the ground that it appears upon the face of said amended complaint that plaintiff is not a citizen of any state of the

United States, but is a citizen of the Republic of Mexico, and that defendant is a corporation duly organized under the laws of the State of New York, and is, therefore, a citizen and inhabitant of the State of New York, and not an inhabitant of the District of Arizona, and that, for the reasons in this demurrer set forth, this Court has no jurisdiction of this action.

WHEREFORE, defendant prays that this demurrer be sustained, and that plaintiff's action be dismissed.

ELLINWOOD & ROSS,
CLIFTON MATHEWS,
Attorneys for Defendant.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Special Demurrer to Amended Complaint. Filed October 11, A. D. 1919. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. [11]

In the District Court of the United States, for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Motion to Strike Special Demurrer to Amended Complaint.

Plaintiff moves the Court for an order striking from the files and records of this cause the defendant's "Special Demurrer to Amended Complaint," on the following grounds:

(1) Because the defendant did heretofore, in the first instance, file herein its answer to plaintiff's complaint, which answer is a general appearance, and that by such appearance the defendant waived all questions of venue.

(2) Because on the call of the Court calendar for setting cases for trial at this term, after plaintiff had amended his complaint by writing therein, "and is a citizen of the republic of Mexico," it was then and there agreed, in open court, that the demurrers then contained in defendant's answer on file herein should be considered as pending against plaintiff's complaint so amended, and which said answer after said agreement then was a general appearance, and that it waived all questions pertaining to venue and jurisdiction of this court over the person of the defendant.

(3) The so-called "special demurrer" does not conform to the provisions of sec. 459, Civil Code, Rev. Stat. Ariz. 1913, in that there is no claim that defendant appears specially for the sole and only purpose of objecting to the jurisdiction of the court.

L. KEARNEY,
Attorney for Plaintiff. [12]

[Endorsements]: Epifanio Guerrero vs. Phelps Dodge Corporation, a Corporation. Motion to Strike from the files the Special Demurrer of Defendant. Filed October 15, 1919. Mose Drachman, Clerk. By Effie D. Botts, Chief Deputy Clerk. [13]

At a regular term, to wit, the May, 1920, term of the District Court of the United States for the District of Arizona, held at the courtroom of said Court, in the city of Tucson, State and District of Arizona, on May 13, 1920, at 9:30 A. M. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry.)

No. L.—219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

Minutes of Court—May 13, 1920—Trial.

This case came on this day regularly for trial, the plaintiff appearing in person and with his counsel, L. Kearney, Esq., and James R. Dunseath, Esq., comes now the defendant, by its counsel, Clifton Mathews, Esq., John E. Sanders, Esq., and James S. Casey, Esq., and both parties announce they are ready for trial.

Eighteen jurors are then duly called according to law, by the clerk, and sworn to answer as to their qualifications, and examined by counsel; the jurors C. J. Barry and C. J. Johnson are challenged for cause by the plaintiff, which challenges are allowed by the Court, and said jurors are excused from this case, and jurors Wm. M. Pyle and Almond C. Walker are called in their stead and duly sworn by the clerk. The eighteen jurors now in the jury-box are found to be qualified, and thereupon counsel for respective parties each exercise right of three peremptory challenges and the remaining twelve jurors, to wit: Jas. C. Miller, F. J. Krevil, Tom Ligier, Jas. F. Edmonds, Wm. L. Harding, J. B. Murchison, J. S. Olmstead, Chas. Brassert, W. F. Willis, J. E. Beatty, Wm. M. Pyle, and Almond C. Walker, are called by the Clerk according to law, and duly sworn to try the issues joined herein.

Thereupon, James R. Dunseath, Esq., reads aloud the complaint [14] in this case and makes a statement to the jury on behalf of plaintiff, whereupon Clifton Matthews, Esq., reads defendant's answer herein to the jury.

Thereupon a Spanish interpreter is sworn at the request of the plaintiff, and John W. Walker is sworn as court reporter, at the request of the defendant. At the request of the plaintiff, the following witnesses were duly sworn and placed under the rule, and excluded from the courtroom during the trial of this case, to wit: Dr. H. W. Rice, J. P.

Hodgson, Maude L. Messing, Dr. J. B. Gray, Dr. D. M. Detweiler, and Dr. H. H. Stark.

The plaintiff, then, to maintain upon his part the issues herein, takes the stand as a witness in his own behalf, and is duly sworn, examined and cross-examined.

Thereupon the defendant moves the Court for an examination of the plaintiff's eyes by a physician to be selected by the Court, which request is agreed to by the plaintiff.

The plaintiff then, to further maintain upon his part the issues herein, calls as a witness Dr. Charles P. Dulin, who is duly sworn, examined and cross-examined. The plaintiff then rests his case.

Thereupon the defendant, for the purpose of maintaining on its part, the issues herein, calls as witnesses Dr. H. W. Rice, Maude L. Messing, J. P. Hodgson and Dr. J. B. Gray, each of whom in turn is duly sworn, examined and cross-examined. The plaintiff, Epifanio Guerrero, is then called for further examination.

The hour of adjournment having arrived, the said jury is excused by the Court from further attention until the 14th day of May, 1920, to which time the further hearing of this case is now ordered continued. [15]

At a regular term, to wit, the May, 1920, term of the District Court of the United States for the District of Arizona, held at the courtroom of said court in the city of Tucson, State and District of Arizona, on May 14, 1920, at 9:30 A. M. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry.)

No. L.—219.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

Minutes of Court May 14, 1920—Trial (Continued).

The further trial of this cause having been continued from a previous session of this court, comes now all parties hereto and the further trial of this case continues as follows:

The defendant, for the purpose of further maintaining upon its part the issues herein, called Dr. D. W. Detweiler as a witness, and said witness is duly sworn, examined and cross-examined.

Thereupon it is stipulated by the parties to this action that the same questions asked at the examination of defendant's witness Dr. J. B. Gray may be considered as having been put to the defend-

ant's witness, Dr. D. W. Detweiler, with the same rulings and exceptions.

Dr. H. H. Stark is then called as a witness upon the behalf of the defendant, and is duly sworn and examined, and thereupon the defendant rests its case.

Thereupon Dr. B. F. Hartridge, a physician selected by the Court, upon application of the defendant, and with the consent of the plaintiff, is called as a witness, and being duly [16] sworn is first examined by the Court, and then by counsel for the plaintiff and defendant respectively.

Thereupon, there being no further testimony, this case is argued to the jury by respective counsel, after which the Court orally instructs the jury. The defendant then and there in open court duly excepts to the refusal of the Court to give certain instructions requested by the defendant. Thereupon the jury retires in charge of their bailiff, an officer of this court, first duly sworn for that purpose, to consider of their verdict.

And subsequently, said jury returns into court and their names are called, and all answer thereto respectively, and upon being asked if they have agreed upon a verdict, reply that they have, and thereupon present the following verdict:

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the above-named plaintiff Epifanio Guerrero and assess his damage in the sum of Twenty-seven Hundred Fifty ($2,750.00) Dollars.

Thereupon, it is accordingly ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff do have and recover of and from the defendant the sum of Twenty-seven Hundred and Fifty Dollars, with his cost herein expended.

Thereupon the jury is discharged from this case.

Judgment.

This action came on regularly for trial on the 13th day of May, 1920, the plaintiff being represented by his attorneys, L. Kearney and James R. Dunseath, and the defendant being represented by its attorneys, Ellinwood & Ross, and Clifton Mathews. A jury of twelve men were regularly impanelled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence and argument of counsel and the [17] instructions of the Court, the jury retired to consider of their verdict, and subsequently, on the 14th of May, 1920, returned into court and being called answered to their names, and say that they find the verdict for the plaintiff and against the defendant in the sum of Twenty-seven Hundred Fifty ($2,750.00) Dollars.

Now, therefore, by reason of the law and the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED that the plaintiff, Epifanio Guerrero, do have and recover of and from the defendant, Phelps Dodge Corporation, a corporation, the sum of Twenty-seven Hundred Fifty ($2,750.00) Dollars, with interest thereon at the rate of six

per centum per annum from date hereof until paid; together with the plaintiff's costs and disbursements incurred in this action, amounting to the sum of $43.05, with like 6% interest thereon, until paid. [18]

In the District Court of the United States, for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Motion for New Trial.

Comes now the above-named defendant and moves the Court to set aside the verdict herein rendered and to grant defendant a new trial herein, for the following reasons:

I.

The Court erred in sustaining plaintiff's objection to defendant's cross-examination of plaintiff by which defendant proposed to show that the plaintiff's left eye was not in the condition plaintiff testified that it was, and that plaintiff did not state such to be its condition when he was examined by the defendant's witness, Dr. H. W. Rice. For this purpose the defendant propounded the following question and the following discussion ensued: [19]

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on the examination of his own counsel, has already voluntarily described not only his acts in point to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony on account of some water he says Doctor Rice put in his eyes being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's counsel, and I must confess that I don't know at this time whether calling for that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff

calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to [20] the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained?

The COURT.—Yes.

Mr. MATHEWS.—May the record show our exception, your Honor?

The COURT.—Yes.

The aforesaid ruling constituted error for the reason that the Court thereby held that the plaintiff had not waived the privilege as to the communications between the defendant's witness, Dr. H. W. Rice, and the plaintiff and that the matter sought to be elicited was privileged. [21]

II.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Dr. H. W. Rice, by whom defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, and that the relation of physician and patient did not, in fact exist between the defendant's witness, Dr. H. W. Rice, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question and the following discussion ensued:

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object, it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter?

The COURT.—Yes, the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination. [22]

The COURT.—No, he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

Mr. MATHEWS.—I would suggest that we do

not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privilege. We could not consistently.

Discussion.

The COURT.—I will sustain the objection for the present. [23]

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

The aforesaid ruling constituted error for the reason that the Court thereby held that the matter sought to be elicited was privileged, and that the privilege had neither been waived by the preceding examination of the defendant's witness, Dr. H. W. Rice, nor by the testimony of the plaintiff.

III.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Dr. J. B. Gray, by whom defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, and that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question, and the following discussion ensued:

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Question sustained. [24]

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right; I will withdraw the rule and allow you to be heard.

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute

does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and, under the rule, submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I recall one instance at least where such testimony was permitted in this court, the testimony of a physical examination, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition, which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating [25] with his employer seeking some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose, if fully explained to the employee, the person supposed to be injured, and the arrangement has

been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the information obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement or possible negotiations. Now, if there is any element of confidence to that, it does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some physical director or some athletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony already given by Dr. Gray shows absolutely no relation of physician and patient existed in this case. The privilege never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye," [26] "or anything else about me; I will let him examine me with reference to an in-

jury or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then, perhaps, we will be able to arrive at some settlement or something. You will have the facts more to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as to his understanding, whether he did so agree before ruling on that.

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit? [27]

The COURT.—I think so.

EPIFANIO GUERRERO, being recalled by counsel for the plaintiff by permission of the Court, and having been heretofore duly sworn, through the interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

Q. When you went to El Paso, what did you understand you were going there for? Did you understand that you were going there to have your eye treated?

Mr. MATHEWS.—Your Honor, we object to that.

The COURT.—The first part of the question is perfectly proper, I think, but the latter part of it is objectionable. His understanding of what he was going there for is proper.

Q. What did you understand you were being sent to El Paso for?

A. To benefit my eye; it would do my eye some good.

Q. Did you believe, when you went there, that you were to receive treatment for your eye, or try to better your eye or not?

A. Yes, sir; with that intention.

Q. You went there for the purpose of receiving some benefit to your eye?

A. Yes, sir; most assuredly. How would I be in this fix?

Q. Did you pay hospital fees when you worked for the company? A. Yes, sir.

Q. And that goes to help keep up the hospital by the doctors there?

The COURT.—I want to know if there was any

understanding between this witness and any other officer of the company at the time he left. [28]

Mr. KEARNEY.—He says now, to get a better eye.

The COURT.—You may cross-examine him, if you so desire.

Cross-examination by Mr. MATHEWS.

Q. You only stayed in El Paso one day, I believe, you testified?

A. The day that I left, the doctor sent me to El Paso, and I got there at two-forty, and I went to the doctor right away, and I left there the next day.

Q. They did nothing to you but examine you, did they? A. That is all.

Q. You came back as soon as he examined you?

A. Yes, sir; sure, I was going down on some business.

Mr. MATHEWS.—No further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. He may believe anything. The true situation here is whether or not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Examination by the COURT.

Q. What, if any, conversation, did you have with

Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso?

A. Nothing. [29]

Q. Did, or did he not, request—did you not request of him or the company a settlement for the injury to your eye? A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir; he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist, and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

A. No, sir; I have never been to El Paso after that.

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer to obtain a report from the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company, do you mean?

Q. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenco that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury? [30]

A. No, sir; he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in that matter being evenly balanced, I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff has given at this point is positively rebuttal. It is not part of his main case.

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what it is for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a *prima facie* case, or showing here, and a very strong one, that a certain state of facts existed which would take this case entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such a conversation with him, but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then after [31] the showing is presented, the whole thing, under proper instructions, goes to the jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me—I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like

anything else, or other situations, it is simply a matter for the jury, under the proper instructions from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground that it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception. [32]

The aforesaid ruling of the Court constituted error for the reason that the Court thereby held:

(a) That the matter sought to be elicited was privileged.

(b) That the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff,

(c) That the burden of proving that such relation did not exist was on the defendant.

The Court erred in said ruling:

(d) In changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the defendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in chief and not rebuttal.

(e) In passing on a question of fact and taking it from the jury.

(f) In weighing the evidence and determining the credibility of witnesses.

(g) In holding the evidence to be evenly balanced on the question presented.

(h) In excluding the testimony offered after holding that the evidence was evenly balanced.

(i) In excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, [33] and the plaintiff.

(j) In holding the question presented to be one of admissibility or competency and not of weight or credibility.

(k) In, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

IV.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Dr. J. B. Gray, by whom defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, and that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following questions and the following discussion ensued:

Q. What part of the examination did you conduct, and what part did Dr. Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception. [34]

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your reply, Doctor. Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further examination. Just one [35] more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

The aforesaid ruling of the Court constituted error, because the Court thereby held that the matter sought to be elicited was privileged and that the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

V.

The Court erred in refusing and failing to give the following instruction to the jury as requested by defendant:

Gentlemen of the Jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments, or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sus-

tain it. In this case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and [36] this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under the law, was required to sustain the objection. The fact that the plaintiff has made this objection, and has thereby kept these physicians from testifying, is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant. [37]

State of Arizona,
County of Cochise,—ss.

James S. Casey, being sworn, says that he is one of the attorneys for the defendant named in the foregoing motion; that as such attorney, and acting for and on behalf of said defendant, he served said motion on L. Kearney, Esquire, attorney for the plaintiff named in said motion, by depositing a true copy of said motion in the Postoffice at Bisbee, Arizona, addressed to said attorney for said plaintiff, at his place of residence, to wit, Clifton, Arizona, with postage fully paid thereon on the 14th day of June, A. D. 1920.

JAMES S. CASEY.

Subscribed and sworn to before me this 14th day of June, A. D. 1920.

[Seal] JEAN BOYD,
Notary Public.

My commission expires February 26, 1924.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Motion for New Trial. Filed June 16, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [38]

At a regular term, to wit, the May, 1920, term of the District Court of the United States for the District of Arizona, held at the courtroom of said Court, in the city of Tucson, State and District of Arizona, on June 24, 1920, at 9:30 A. M. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry.)

No. L.—219.

EPIFANIO GUERRERO,
Plaintiff,

vs.

PHELPS DODGE CORPORATION,
Defendant.

Minutes of Court—June 24, 1920—Order Denying Motion for New Trial.

Defendant's motion for a new trial herein hav-

ing been heretofore submitted to the Court and taken under advisement, and the Court having fully considered the same, does now order that the said motion for a new trial be, and the same is, hereby denied, to which ruling on the part of the Court the defendant duly excepts. [39]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in this court, at the May, 1920, term of said court, at Tucson, Arizona, before the Honorable William H. Sawtelle, United States District Judge, plaintiff appearing in person, and by his counsel, L. Kearney, Esquire, and James Dunseath, Esquire, and defendant appearing by its counsel, Clifton Mathews, Esquire, John E. Sanders, Esquire, and James S. Casey. Esquire, the following proceedings were had, to wit:

A jury was called, empanelled and sworn according to law and thereupon plaintiff, to sustain the issues on his part, offered and introduced the following testimony. [40]

Testimony of Epifanio Guerrero, on His Own Behalf.

EPIFANIO GUERRERO, plaintiff, being first duly sworn through James Hunter, interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

My name is Epifanio Guerrero. I live in Morenci. I came there in 1917. My family lives there. I have had experience as a miner since I was fourteen years old and have worked in Mexico. I have worked in Morenci as a miner for about a year for the Morenci Company, the defendant in this case.

On January the twentieth of last year, the time I got injured, I was working for the defendant company. I was a miner in the London Mine. We were digging out ore and one of them big rocks fell down and I hit it with an eight-pound sledge hammer and when I hit it, one of them pieces broke off and hit me in the eye. That was at eleven o'clock in the morning during my shift. That was part of my—my part of my business, to break the great big rocks, and when the miners had to use the blast to break the big rocks and I broke the little rock.

The foreman for the defendant company told me to break those rocks with a sledge-hammer. [41] We put it in a wheelbarrow and we hauled it from there to the chute, where it was carried away in the car. This was done in the mine where they dug a tunnel on one side, and the other, and there is where we were breaking that rock and hauling it over to

(Testimony of Epifanio Guerrero.)

the cars. Where we were working I think it was about one hundred and fifty feet underground, kind of an incline. I was working down in the mine, in the ground at the time I got injured. There was only two partners of us working together in the tunnel, no more. My partner was on one side, one square of the lumber, and I was on the other square of the lumber myself. What I mean by a square is some lumber fixed up there in the tunnel so that the ore will not come down on you, and that stope, when you are working in a stope, and whenever you come across to a place where there is danger, you put that lumber right there and protect the rock or ore from coming down on you. I don't know where this person is that was working with me. When they stopped the work where I was working, he stopped him from work and he went away. He was also deaf besides; the man that was working with me was deaf.

When I got my injury, when we went up at noon to dinner, I reported it to the foreman. I told him that I was going to the doctor, that I received a blow in my eye, and he said, "All right," and he also told me to go to a doctor. [42]

I went to the doctor to treat me on the twentieth of January, 1919. The doctor treated me at that time. This was in Morenci. I used to go to the doctor about every other day. I went to him for eight days and then he put some kind of a water that was too strong in my eye, or something, and from there they sent me to Phoenix. The doctor boss

(Testimony of Epifanio Guerrero.)

foreman sent me to Phoenix. They gave me a letter to take to the doctor. I found the doctor at Phoenix. That doctor only examined my eysight and that is all. I stayed there one day. He sent me back to Morenci again. He did not give me a letter to take back to Morenci.

When I came back from Phoenix, they put me in the hospital twenty-five days. After they had me there at Morenci there in the hospital twenty-five days and treated me twenty-five days, they sent me to the—the boss doctor there at Morenci sent me to El Paso again to another doctor in El Paso. He gave me a letter to the doctor in El Paso. I also found him. I only stayed there one day also. The doctor in El Paso he also examined me and that is all he done to me. They did not give me any letter; they just sent me back to Morenci. I went back to Morenci. They did not treat me. I used to go over to the doctor at Morenci and put some drops in my eye; that is all he did. He didn't give me any treatment. [43]

Q. Tell him I don't want him to tell at this time what the doctors told him or what he told the doctors.

Mr. MATHEWS. — I think this examination ought to be conducted in the ordinary way.

The COURT.—It is a question whether you have not already relieved the plaintiff of the privilege by asking him to tell what the doctors did for him.

Mr. KEARNEY.—No, the statute says the doctor cannot testify without the consent of the patient.

(Testimony of Epifanio Guerrero.)

The COURT.—You have put in evidence that the man went to the doctors and was treated and it would seem to me that you have waived the privilege by asking him how the doctors treated him.

Mr. KEARNEY.—I understand that that is not a privileged communication.

The COURT.—That is to be passed on. I am just cautioning you, that it looks like you are getting very close to the line.

This injury gave me pain and also drew a little blood. All the time I was treated in the hospital I had pain and I have pain still. It has not left my eye. [44]

Q. And do you have any vision now in your left eye, A. No, sir.

Before I went to work for the defendant company, there was no physical examination. Before the twentieth of January of last year, I was well in my eyesight. When I went to work my eyesight was all good. At the time of my injury the company paid me four-thirty for seven hours and a half work. When the company at Morenci work on Sundays, I work on Sundays, and when they did not work on Sundays, I did not work on Sundays. I laid off only when I got sick of cough and sometimes I would take cold and I would have to lay off during the time, too. Most of the time I was working. During the time I got sick with influenza nine days, and I laid off those nine days. When I was working for the defendant, I would sometimes lay off. I can't say I was always at

(Testimony of Epifanio Guerrero.)

work. Sometimes I work, sometimes I did not. As a rule I laid off three days or five days a month. Up to the time of my injury, I was well. My health was good; I was well all the time.

I don't drink. I don't like liquor. I could see out of my left eye before the twentieth of January of last year. When I went to work out there my eyesight was good. When I went to work [45] in the mines at Morenci, I was in good health. I have been injured about fifteen months and I have not worked one day. I haven't worked because I can't work; I can't see; I am not capable of working. I am thirty-five years old. When I was injured, I was right at thirty-three years old and I have been in this about two years, so that will make thirty-five.

Cross-examination by Mr. MATHEWS.

I said I came to Morenci in 1917, in February. Before I came to Morenci I was living in Mexico. I came from Mexico. I had never come to the United States before. I am not miner; I am a mucker as you call it, a mucker. As I said before, in Mexico I was a miner all the time, but when you come here to the United States, they put you, as they call, a resagador. That is what I was working at at the time. In Morenci I never was a miner; always a mucker. In Mexico miners and muckers are not the same thing. They call him muckers here, and also in Mexico they are muckers, and muckers in Mexico are just the same as they are here in the United States.

(Testimony of Epifanio Guerrero.)

I don't know the name of the man who was working with me. The man was there and he was [46] working in another place and the boss put him to work and put me to work where I was working at that time. He could see me and I also told him I got injured, but he could not understand me because he could not hear and he only shook his head. Yes, he saw me. He was working right at that square and I was on the other one and he saw the rock when it hit me in the eye, and I says to him: "I hurt my eye with that rock," and he looked at me and just shook his head.

The piece of rock that hit me in the eye was about that big (indicating). When it struck me they have a strong blow. That was a piece of ore rock. When you strike that and they split off they go very fast. This rock was about three or four inches long. They are heavy; the ore was very heavy. Some little pieces would weigh big, weigh half a pound. There are very small rocks like that that may weigh a whole lot if it is first-class ore, black ore.

The rock that I was striking was first-class ore. It hit me right in the eye. It remained there in the ore in the pile. Nobody could pick it up. That was about eleven o'clock in the morning. I told the foreman when we went out to get dinner. When they took us up to get dinner the foreman was sitting up there on some lumber and I went to him and I told him I was going to the doctor, I had been injured, and he said, "All right." [47]

(Testimony of Epifanio Guerrero.)

We usually came out, bring us up lacking ten minutes of the time for dinner. When they call you and give you ten minutes' time to get out and when you get out it is twelve o'clock and you get up to your dinner. Well, lacking ten minutes of the time for us to get out, it was about one hour after I was hurt. We were still working at that time. From the time I got my eye hurt until I went out to lunch I kept on working, and at that time when we went out I reported to the foreman; they call him Jean, but I think his name is Santiago. He is still foreman at Morenci. He is around the Arizona there somewhere. I don't know whether he is still at Morenci or not. Yes, sir, he told me to go to the doctor because I told him I was going to see the doctor and he says, "All right, go and see the doctor." I went to see the doctor right away and then he treated me and put a bandage around my eye. That was Dr. Rice, I think they call him. He was one of the doctors at Morenci.

Q. You stated in answer to your attorney's question this morning, you stated that he put some water in your eyes that was too strong. Do you know the name of that water?

A. I don't know what medicine he treated me with. They knew what medicine they used; I didn't. [48]

Q. What day was it he put this strong medicine in your eye, the first day or some later day?

A. He says he treated him for some days with some black medicine that he put in my eye, and one

(Testimony of Epifanio Guerrero.)

of those days he went over there and he dipped a little piece of stick and a little cotton on the end of that stick, and he put it in a bottle, and when he come out with it it smoked like, and when he put it in my eye, it burned like everything. It was pretty strong for my eye.

Q. Was that the first day that you went to him?

A. No, sir; after he had been treating me he put that water on me.

The head doctor, kind of a blond fellow, sent me to Phoenix. I don't know his name, the foreman doctor. It was the man that was supposed to have charge of all the other doctors or officers around there. He was supposed to be over all the other doctors at the company hospital. He was the boss. I don't know if the name of the doctor at Phoenix was Doctor Martin. They know what doctors their names was; I don't know any of the doctors. The doctor did not tell me his name either. I didn't know the names of the doctors that they have sent me to. I found this doctor because the Mexican man told me, told me the building where the doctor was, and I went over there [49] to the building and he says, "You go up there and you will find the doctor." And the man in the elevator, I showed him the letter I had with the doctor's name and he showed me the doctor's office. I could not read the name; I don't know how to read. I can't read or write.

I stayed in Phoenix only one day. This Phoenix doctor did not treat me, he only put some drops and

(Testimony of Epifanio Guerrero.)

examined my eye and that is all he done to me. I have not seen him in the courtroom. If I would see him I would not know him. I have not brought him here as a witness.

As soon as I returned from Phoenix I was sent to the hospital; I think I was in the hospital during February. There was a nurse there that treated me there. There was one head nurse and another one that treated me. The head nurse looked after me. I don't know what her name was. I stayed there twenty-five days, but I didn't find out the nurse's name.

The same doctor sent me to El Paso, that blond doctor that I said before had sent me to Phoenix. I don't know his name.

Q. Do you know Captain Hodgson, the manager of the defendant corporation at Morenci?

A. He says they have a captain and also another one and I don't know which one of the captains it was. [50]

I do not know Mr. Hodgson, the manager of the company at Morenci. The doctor that sent me to Phoenix was the one that sent me to El Paso. He gave me a letter to both places. I don't know the name of the doctor I saw in El Paso. I only saw the one that they sent me to. I didn't know his name then. I found him because I went to the building there and I went to the elevator boy, the man that handled the elevator, and I showed him that letter and he told me to go upstairs, that the doctor was up there, and I went up there. I know

(Testimony of Epifanio Guerrero.)

what building because they told me. Most anyone would tell me. The letter that I had the doctor's address was addressed on the envelope, and someone that spoke English told me that the building was over there.

Only one doctor examined me there. He examined me two times. I went home right away. I never went to El Paso again. I only made one trip to El Paso. I do not know Dr. Gray in El Paso. I know Dr. J. B. Gray in El Paso. I know Dr. D. W. Detweiler. I do not know Dr. H. H. Starke in El Paso. Neither one of those doctors examined me. The only one that examined me was the one they sent me to. I don't know his name. I only made one trip to El Paso. [51]

My left eye does not burn. My left eye is blind; I can't see with it. I was drawing $4.30 per day as a mucker. The kind of cough I had when I laid off was a natural cough. You will get a natural cough once in a while. I don't suffer from coughs. I had a cough when I laid off. I had influenza for nine days. I don't remember when. It was before this accident in Morenci. I laid off during that time.

I have not done one day's work since my eye was hurt. I still live at Morenci. I can't see out of the left eye. I don't work because I am not able to work. That is not the reason I am unable to work. I am unable to work since I was injured because of my eyesight. I am short of my sight in my eye; that is the reason I don't work.

Q. Are you willing to submit yourself to an ex-

(Testimony of Epifanio Guerrero.)

amination by physicians to be appointed by this Court to examine your eye and report to the Court and the jury the true condition of your eyesight at this time?

A. He says, "I have been examined; what more examination do you want?"

Q. Are you willing to submit to the kind of examination I mention?

A. He says, "I have been suffering; no, sir; I have been suffering so long, what is the use of having that examination?" [52]

Q. Then you don't want to be examined any more? A. No, sir.

Mr. MATHEWS.—Your Honor, we now inquire of counsel for the plaintiff if they, as his attorney, are willing to submit him to examination by impartial physicians to be appointed by this Court and test his eyesight, and report to the Court whether or not it is true he can't see.

Mr. KEARNEY.—We have no objection to submit.

Mr. DUNSEATH.—If this man is not suffering from an injury we want to know it.

Mr. KEARNEY.—If you will appoint some fair person. We are perfectly willing.

Mr. DUNSEATH.—If this man is not entitled to recover for pain and suffering, now we don't want to recover.

The COURT.—The Court will select an impartial physician if there be one to be found in town and

(Testimony of Epifanio Guerrero.)

have them examine him, but we won't delay the trial now for that purpose.

Mr. MATHEWS.—I have no further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. There is a question I desire to ask— [53]

Mr. KEARNEY.—You admit that he is a citizen of Mexico and born there?

Mr. MATHEWS.—Yes, there is no use of proving that.

Redirect Examination by Mr. DUNSEATH.

I think the letter which I had when I went to El Paso and that I testified I showed to the elevator boy had the doctor's name on it. I showed the elevator boy the letter. When I showed him the letter he only says, "Over there; it is over in that building." He didn't take me there. After I showed him the letter he showed me where the office was.

The cough I had was just a little cough, just a natural cough. The cough I had was a little cough; it passed away right away.

When I came back from El Paso they put some drops in my eye and after that they did not treat me any more. I don't remember how much time there was between the time I got the accident and the last treatment, but it was in the month of March.

Recross-examination by Mr. MATHEWS.

My left eye first became blind the same time as

(Testimony of Epifanio Guerrero.)

that injury. I have been blind in that eye ever since that rock struck me. Yes, I was injured in that eye when I first went to Doctor Rice. [54]

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on the examination of his own counsel has already voluntarily described not only his acts in going to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony, on account of some water he says Doctor Rice put in his eyes being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's counsel, and

(Testimony of Epifanio Guerrero.)

I must confess that I don't know at this time whether [55] calling for that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained.

The COURT.—Yes. [56]

Mr. MATHEWS.—May the record show our exception, your Honor.

The COURT.—Yes.

(Testimony of Charles P. Dulin.)

Mr. MATHEWS.—That is all the cross-examination I have, your Honor.

Witness excused.

Testimony of Charles P. Dulin, for Plaintiff.

CHARLES P. DULIN, witness for plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. KEARNEY.

My name is Charles P. Dulin. I live in Tucson. I am a physician, limiting my practice to the eye, ear, nose and throat. I graduated in medicine in 1893, St. Louis, Missouri, St. Louis College for Physicians and Surgeons, and since that I have graduated at the army medical school in 1905 and been engaged in the practice privately and in the United States Army since. I was the contract surgeon and lieutenant and captain in the Medical Reserve Corps. From 1905, 1906, as a contract surgeon for about a year and a half or two years and then became a First Lieutenant and was put on the inactive list about 1913 for physical disability and when the present—when the last war broke out, I was recalled for active duty. I was on active duty for six months in 1917 and ended in January, 1918. [57]

I commenced practice here in February, 1918, I was licensed in 1907 in Arizona. I limit my practice to the eye, ear, nose and throat. Since I have been in Tucson I have done nothing else. In the army, as near as possible, my practice was limited

(Testimony of Charles P. Dulin.)

to that, although it is impossible to limit it to any one subject entirely. A man is liable for any kind of service if you understand the condition, but wherever it was extensive enough, as, for instance, in 1918, I was head of the Eye Clinic at the base hospital at Vancouver Barracks, Washington, for the six months I was there, and at various other posts when there were sufficient medical officers. At garrison, I was usually called upon to handle all branches of the service in addition to other work.

I have seen the plaintiff in this case. He came into my office for an examination last Sunday morning. I believe that you were with him, at least you were there shortly afterwards. I am not certain that you brought him in. I was requested by you or Mr. Dunseath, to make an examination of his eye, which I did. His left eye, the clear part of it, on the reflection of a beam of light over the sight shows a smoke condition similar to that which you see when you hold a piece of smoked glass to the light. The outer surface of the same clear part of the eye is roughened, and irregular, and outside of that the physical condition is normal. [58] The vision of that eye undoubtedly is low, probably so low as to render vision impossible. That is, by vision, I mean, the accurate seeing of objects, but undoubtedly can deferentiate light from darkness. That would be about as much as I would be willing to say positively he could do. It might have been caused by a traumatic injury, it might. By foreign substance falling into the eye, it might.

(Testimony of Charles P. Dulin.)

Cross-examination by Mr. MATHEWS.

I examined the plaintiff just once. It was last Sunday morning at my office. No other physician took part in the examination. There was an interpreter present; I don't know his name. I am not certain but what he was the Mexican Consul. I talked with the plaintiff through an interpreter at that time. His attorneys, Mr. Kearney and Mr. Dunseath, were both present. I believe I remember that Dr. Clyne was in the office for a moment, but not long enough to be said that he was present during the examination. He did not stay through the examination nor take any part in it. I examined the one eye. It was the left eye.

The examination was first made, the first portion of the examination was merely an observation as to the condition of the eye and then I used an ophthamoscope to look into each eye, and then I used a pencil of light in a darkened room to observe the condition of [59] the inner part of the eye behind the clear part, you understand, and then I used an ophthalmometer to measure the cornea, or clear part of the eye, measured the outer surface for irregularities. That constituted the examination. This outer surface that was roughened, that was the outer surface of the clear part of the eye; that is, not the part sometimes spoken of as the white of the eye. I don't think you would call that the white of the eye. The white of the eye is the rest of the eyeball that this part is set in. This is the crystal part that is set in the eyeball.

(Testimony of Charles P. Dulin.)

That was where I found this roughness or irregular surface. It would be very hard to tell what the cause of that was. The patient did not give me a great deal of history on account of the fact that the gentleman did not seem to speak English. I got what was necessary. I didn't try to get a history of the case because it did not seem to be the point I was examining for, which was the present condition. There was no object in learning the history.

This roughness seemed to be distributed over the entire surface. It covers the pupil and also the clear part of the eye. I can't say that it was more noticeable in one part than another. The examination that reflected images on there, those are distorted. It shows that the image on the smooth surface, those images are reflected without any distortion whatever, they are reflected in exactly the [60] same shape. This distortion occurred practically over the entire clear part of the eye, consequently, I could see no part that was—there was practically no difference. You could get a better idea if you took some of those headlight lenses that automobiles have that are intended to diffuse the light. The surface covers that diffusion of light. There was no regular system on this roughened surface. It seemed to be the result possibly, I might say, from the formation of scar tissue; that was one of the things I observed when I applied light in the various ways I applied it.

(Testimony of Charles P. Dulin.)

The ophthalmometer is an instrument designed to measure the clear part of the eye or cornea, for the purpose of supplying the patient with glasses in case of an irregularity in it, which it is possible to correct. The ophthalmoscope is an instrument for looking inside of the eye. It is to look into the eye with. You can see both the front cavity and the back cavity or partition in the eye ball by this means. By means of a narrow ray of light reflected on a mirror through the pupil of the eye. I used an ophthalmoscope and I used the ray of light that reflected into the eye. I used that at the side of the eye to extend this small pencil of light across laterally through the clear part of the eye. Naturally, I also examined the eye as thoroughly as I could [61] with the naked eye before I began any of this mechanical examination.

Q. Now, there are various ways in which vision can be measured and set down or described in figures indicating the ratio of perfect vision, are there, Doctor? A. There are.

Q. Did you take any notes of those in this case?

A. I did not.

Q. You did not undertake that?

A. No, sir; I didn't examine to see the amount of refraction there was.

Q. However, you are familiar, of course, with those tests? A. I use them regularly.

Q. And with your specialty being the eye, with one or two others, and with your experience both in general practice and in the practice before the

(Testimony of Charles P. Dulin.)

public, and your service in the Army, you are acquainted with various tests that are intended to reveal one who is a faker?

A. We have a great deal of work like that, particularly in the Army.

Q. You know there are tests of that kind for use in the Army and among medical men elsewhere, don't you?

A. I have used several of them. [62]

Q. In this particular instance, you did not make such tests, did you, Doctor?

A. I could see no reason for it.

Q. No? A. No, sir.

Q. You were not requested to do that, and you did not do it in this case?

A. It seemed to me to be a plain case, the evidence as shown by the examination was sufficient to preclude any possibility of doubt.

Q. The results that you have testified to any way were arrived at without any of those tests?

A. Yes, sir.

The vision of this left eye was undoubtedly low. He may be able to distinguish light from darkness. It is a question of what you mean by vision. As to distinguishing objects or having any practical use of the eye, I don't think I can say. He might distinguish an object as large as a man at a distance of a few feet if he was properly placed between the light, but as to distinguishing objects with a definite vision, I don't think he has. As to determining the fact of whether he is actually blind

(Testimony of Charles P. Dulin.)

in that eye, whether that can be done, is questionable. You have to collect all of your evidence and sometimes you are fooled then. [63]

Q. If a man is properly coached, you think it might not be possible to prove that?

A. I would go further than that; I would say that the eye might be entirely blind; there might be no sight in an eye that was apparently normal, and it is exceedingly hard to tell just where the line comes.

I am familiar with the pupillary reaction to light test. The pupil might react to light and the eye be entirely blind. The practical means of examining the eye is to observe the reaction to light. By reaction to light, I mean that the pupil contracts as the stronger light is thrown in the center of the eyeball. When that fails to occur, it would indicate something abnormal. I am acquainted with another test that is applied in cases where a man claims to be blinded in one eye and has his sight in the other eye, with some tests that I used in that way to prove the falsity of the claim. I have applied it many times myself.

One of my favorite tests is the use of green and red lenses with green and red lenses and green and red figures or dots, as the case may be. The green and red cancel each other in the light, and consequently, with the red light, looking through a green glass, you get nothing, and vice versa, and looking through a red light—red glass, you see a red light. By changing the lenses in front of a

(Testimony of Charles P. Dulin.)

[64] man's eye so that he really, after a short time, possibly does not know which one is the red glass and which one is the green glass, and whether he is looking at red lenses or green lenses, he may become confused and he may see with the eye that was blind before. That is conclusive, would be fairly conclusive. In the course of a short time, he would be overtaken as an imposter, undoubtedly. You might have to examine him several times, in fact, I would prefer to give you an opportunity for no chance of an error. If one were to take a little time, I think you would expose him if he were an imposter.

There are other tests; that is the one I use and I find it is convenient, and it happens to be the one I am using the most of the time. One is frequently used where a lense is placed over the good eye with a short focus, not telling the patient about it, of course, that would not enable him to see a thing with the good eye, and then let him point out the objects presented to him. That is the focusing test. You focus the good eye so that he does not see at a distance. The ordinary patient, not familiar with these technical matters, would not suspect the purpose of the test.

The valuable part of the test is that you change those on the patient, and he, knowing that he is guilty of deception, at last becomes nervous more [65] or less, and finally guesses wrong. That test is just as conclusive as the other. It takes a little time and a little patience, all of those things.

(Testimony of Charles P. Dulin.)

There are tests coming up all the time, there are so many, you could hardly enumerate all of them. Those mentioned are the ones that I use most because they are the most convenient and the apparatus is handy. No, sir, I did not resort to any of those tests in the case of this plaintiff.

I do not undertake to tell the jury what was the cause of the condition of this eye. It might have been caused by various other things as well as traumatic accident. If dust or any foreign substance would get into the eye, that would come under the head of traumatic injury, that would be an injury. I would think a small scratch in my mind would be traumatic as well as a blow with the fist. Any injury inflicted by a heavy blow or by some rather small substance, if it was an injury, would be traumatic; I use the word in that sense.

Aside from getting struck in the eye with a rock or piece of wood or some heavy blow, the condition that I found in this eye could be caused by such a thing as dust or sand or irritation of anything getting into the eye. I say it could. In answer to your question what are some of the well known and common substances that you might name that could very well have caused that condition that you found in the eye, [66] there is sand and dust in the atmosphere and cinders that are present on the railroad and various places where they are using coal, anything that flies into a man's eye at all, pieces of leaves and bark blown off trees, if a person would take it into his eye.

(Testimony of Charles P. Dulin.)

Q. If a person would take it into his head to bring about such a condition purposely, he could very easily do it?

A. He could very easily do it if he had the nerve to last it out.

Q. If he continued a little while? A. Yes, sir.

Q. From your examination of this man, you would not undertake to say whether it was one kind of irritation or injury or the other, would you, Doctor? A. I would not attempt.

Q. No?

A. To make a definite statement of the case.

Mr. MATHEWS.—We have no further questions of the doctor.

Examination by the COURT.

Q. Suppose a man is injured, and a piece of boulder or ore ranging from a quarter of a pound to half a pound strikes him full in the eye, what effect will that have on the eye itself, not the vision, but the eye itself? [67]

A. Well, that depends upon the velocity with which it was travelling. If it was travelling with a velocity that I would associate with that kind of an accident, there would probably be considerable tearing of the soft part around the eye, considerable blood coming into the tissues and a great discoloration probably of the membranes of the eye, I guess that will be understood, and they will become reddened and even blackened when the blood has coagulated.

(Testimony of Charles P. Dulin.)

Q. Could it cause blindness without causing some external visible injury to the eyeball itself?

A. Sometimes blood will cause blindness.

Q. Without causing external visible injury?

A. Any would; yes. I have seen cases where they claimed they had no sight whatever, and there was no reason for them claiming it from any standpoint, other than just the condition of blood that causes that blindness, and this blindness persists sometimes for various lengths of time.

Q. You spoke of a blow. Do you mean a hard substance like rock or a piece of ore?

A. This instance that I referred to in my own personal knowledge was a boxing-glove.

Q. I am speaking of such instrument as this plaintiff testifies, a particle or substance as he testifies struck his eye, could it cause blindness without [68] tearing?

A. Yes; it might cause blindness for a temporary time, the result of shock to the eye, and the following flow of tears would increase the blood supply that comes with it, renders a man unable to see, at least, temporarily, if there is no permanent damage to the eye.

Q. Notwithstanding the fact that there is no visible sign of injury? A. Yes, sir.

Redirect Examination by Mr. DUNSEATH.

That condition may result in permanent blindness of the eye. There are cases where the sight does not return. Sometimes it is such that the patient

(Testimony of H. W. Rice.)

for a day or two does not realize that his eye is seriously injured.

Thereupon, plaintiff rested, and defendant, to sustain the issues on its part, offered and introduced the following testimony:

Testimony of H. W. Rice, for Defendant.

H. W. RICE, witness for defendant, being first duly sworn, testified as follows: [69]

Direct Examination by Mr. MATHEWS.

My initials are H. W. I live at present at Santa Monica, California. In January, February and March, 1919, I was living at Morenci. I am a physician and surgeon, having practiced eight years.

Mr. MATHEWS.—It is admitted by counsel for the plaintiff that Dr. Rice is qualified to testify as a medical expert.

I was practicing at Morenci in this state from January to March, 1919, being the surgeon of the defendant corporation. I had the responsibility and the care of surgical work for the company, injuries and other surgical cases that developed in the camp. Employees of the company who were hurt or became sick and were surgical cases came under my care.

I know the plaintiff, Epifanio Guerrero. I became acquainted with him in January, 1919. He came to the office for treatment for an injury to the eye. It was during the latter part of the month at my office. As I recall, it was between four and five in the afternoon; no one came with him. His

(Testimony of H. W. Rice.)

visit was on account of some injury to his eye.

Q. Did you examine and treat him?

A. I did. [70]

Q. How many times did you see him in all?

A. During the whole course of treatment?

Q. Yes.

A. A great many times. I can't recall. Over a period.

Q. You may state how long a period in all did that care of him and observation of him go over?

A. About five or six weeks or two months. I could not say exactly.

Q. Where was he during that time, if you know?

A. Well, he came to the office at first for treatments, and after that it was in the hospital, the company hospital.

Q. At Morenci? A. At Morenci.

Q. Do you know how long he was in the hospital?

A. Several weeks to a month.

Q. Was he still under your care while in the hospital? A. Yes, sir.

The head nurse, Miss Messing, and the nurse with her, Miss Daily, were the only nurses who had care of him. I had no care of the plaintiff after he left the hospital. That was in the latter part of February, or possibly the first of March, 1919. The [71] other doctor at Morenci who treated him and saw him during this time was Dr. Blatherwick. He was at that time a member of the defendant corporation's medical staff. Dr. Blatherwick was head of the hospital department and the only difference

(Testimony of H. W. Rice.)

between his work and mine was that he did not do any surgery. The surgical cases came under my jurisdiction. I remember that Dr. Blatherwick saw the plaintiff. I do not recall any other physician in Morenci. The plaintiff was referred by Dr. Blatherwick or me to outside physicians. He was referred to Dr. Martin and Dr. Gray of El Paso. They are specialists in that line. I am not a specialist in the eye, ear, nose and throat. I repeatedly examined the plaintiff anywhere from thirty to fifty times, at some of which times I made very careful examinations, at other times only casual.

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object; it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter? [72]

The COURT.—Yes; the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.

The COURT.—No, he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

(Testimony of H. W. Rice.)

Mr. MATHEWS.—I would suggest that we do not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the [73] plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privilege. We could not consistently.

Discussion.

The COURT.—I will sustain the objection for the present.

(Testimony of H. W. Rice.)

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

I saw the plaintiff after he came back from Phoenix and again after he came back from El Paso. I did not treat him after he returned from El Paso, nor send him to any other doctor. After he returned from El Paso, Dr. Blatherwick treated him.

Mr. KEARNEY.—No questions. That is all, doctor.

Testimony of Maude L. Messing, for Defendant.

MAUDE L. MESSING, witness for defendant, being first duly sworn, testified as follows: [74]

Direct Examination by Mr. MATHEWS.

My name is Maude L. Messing. At present I live in Morenci. I am a graduate nurse and have been for two years last December. I graduated from the Red Cross Hospital at Salida, Colorado, and am at the present time employed in the Phelps Dodge hospital at Morenci, which I entered one year ago last September. I was there during January, February and March, 1919. I had charge of the hospital.

I recall a patient by the name of Epifanio Guerrero who was there at one time, and recognize him now as the plaintiff in this case. He was in the hospital very nearly a month. I can give you the exact date. He came in the 9th of February, 1919, and left the 6th of March. He came in for

(Testimony of Maude L. Messing.)

treatment for supposed injuries to the eye. I saw him every day during that time and personally took care of his eye. When he came there on the 9th of February, that was the first time I had seen him. I could not tell what time of the day he entered the hospital. Some time on the night of the 30th.

I looked at his eye on that date. When I looked at his eye I found that the conjunctiva of the eye, or the thin membrane that covers the eyeball and lids seemed to be in quite an inflamed condition, very red and slightly swollen. That was the left eye. I saw the plaintiff every day during the time he was [75] there. I irrigated his eye every two hours during the daytime all of the while he was in the hospital. From the orders, his eye should have an irrigation of a solution which I prepared personally and boiled the implements, and in this case I used a hospital pitcher, we call them, a pint pitcher, and we pour the water over his eye. A vision bath, we call that, pour the water over his eye, holding the lids back. I did that myself. That was done every two hours for the first days or two weeks and after the inflammation seemed to subside, the time was lengthened by the doctor's orders. During the first week there was no apparent change and after about two weeks, the inflammation gradually went down, which is quite a common occurrence in all eye inflammations; the redness cleared up.

The first week there seemed to be no apparent change, which is common in many eye cases, and

(Testimony of Maude L. Messing.)

then the inflammation seemed to clear up to a certain degree, the pupil reflected the light. It did not entirely disappear, but it seemed to be no different from any other ordinary inflammation of the eye. I would not say how many times the redness returned. Perhaps two, maybe three. In the morning, early, when we would go in the room, the eye seemed to be worse than it was the night before. I think nine o'clock was the last time the eye would be fixed. Either nine or ten. These irrigations were not administered during the night. We had no night nurse. He was not watched during the night. [76] No more than just in a ward with other patients. In those times, two or three times, when we noticed a return of this redness, the first time was in the morning, when I would give him an irrigation, which would be directly after breakfast, probably eight-thirty or nine o'clock in the morning. I never noticed any foreign substance in the eye. I know of my own knowledge when he was sent to El Paso, it was the morning of March 5, 1919. He was sent by the company manager, Mr. Hodgson. That was after he had been in the hospital since the 9th day of February. I did not see him again after he returned from El Paso except once on the street during the summer, some months afterwards.

When in the hospital the plaintiff was kept in what is known as the Mexican ward. In our hospital we have one ward devoted almost entirely to Mexican patients. There are four beds in the room.

(Testimony of Maude L. Messing.)

The only complaint I recall that he made was nothing except no matter when you went into the room he always looked up at you and said he could not see. That was the statement he made to everybody that went in. He would make it about any time, any time anyone happened to go in and went towards him like they were going to do anything with him for his eye. He made that remark to me personally and to another nurse that was there at the time. I heard him say he was not able to see in that eye several times a day and every day. [77]

Cross-examination by Mr. DUNSEATH.

I do not understand Spanish fluently. This man did not talk in English. He said, "No veo fuete." I think it literally means, "I cannot see." I do not know whether it means, "don't see very well." I don't know the literal translation. That is the interpretations we give to any case in the hospital.

This redness that I spoke of would recur after we had stopped treating him for eight or ten hours. There would be a lapse between each treatment of eight or nine hours, when this redness appeared. That would not occur naturally. We continued the treatment every two hours because the doctor ordered it that way and we carry out the orders of the doctor of the hospital. The treatment was for the purpose of keeping the redness out of his eye.

Q. And if this treatment stopped, the inflammation again come in? A. Not necessarily.

Q. Well, would you say it would not?

A. No, I wouldn't say that.

(Testimony of Maude L. Messing.)

Q. You know it does, though, don't you?

A. What?

Q. The redness comes back again if the treatment is stopped? A. Not always.

Q. It did in this instance, didn't it? [78]

A. Maybe two or three times; it did not every morning. The treatment was not given in the night.

Q. You mean it was not done?

A. Not during the night; no.

We stopped treatment at about nine-thirty. We did not get up until seven-thirty and had breakfast at eight. The treatments started the first thing at about eight or nine o'clock. There was a lapse of eight or nine hours, and he would complain about not being able to see out of his eye.

Witness excused.

Testimony of Joseph P. Hodgson, for Defendant.

JOSEPH P. HODGSON, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is Joseph P. Hodgson. I live at Morenci, where I am the manager of the Morenci Branch of defendant corporation. I have been in charge for about a year and a half. The physicians are under my supervision.

I know the plaintiff, Epifanio Guerrero. I first became acquainted with him in the latter part of January, 1919. The occasion was an alleged eye injury. He came to see me at my office about that supposed injury. I should say I saw him about the

(Testimony of Joseph P. Hodgson.)

25th of February. At that time he claimed the injury was of recent origin, only a few days prior to the time he called. I should say that I saw him seven or eight times altogether. These visits were about two and a half months apart. I could not see his eye. He had blue eyeglasses on each time. [79] Not the kind he is now wearing. They were blue. He did not claim to be blind at the time he called to see me at the office. He said he could see, but that he had received an injury to his eye; that he had been injured underground by a piece of rock or dirt falling into his eye. He didn't specify which it was. He had been under treatment by Dr. Rice when he first came to see me. Dr. Blatherwick also had charge of him there. They are both company physicians. As to the other doctors to whom he was referred, I first sent him to Dr. Ancil Martin, of Phoenix, for an examination and necessary treatment. He afterwards returned to Morenci. He came into my office and we had a discussion, talked the matter over, and I told him I was willing to send him to any specialist or specialists for a careful examination, if he cared to go.

Q. What was the purpose of these different examinations to be made?

A. So as to be absolutely sure from those specialists that he had really received an injury that had injured his eye, I would settle with him.

Q. You had in mind getting information?

A. Yes, sir.

Q. To act upon? [80] A. Yes, sir.

(Testimony of Joseph P. Hodgson.)

Q. The plaintiff consented to that?

A. Yes, sir.

Q. What specialist did you conclude to send him to?

A. Dr. Detweiler, and I asked in a letter to Doctor Detweiler to also get another specialist and make a report of the condition, but not treat him at all.

Q. The plaintiff understood, and was assured that that was what you wanted, this information?

A. Yes, sir.

Q. Did the plaintiff go then on his trip to El Paso? A. Yes, sir.

Q. You afterwards received a report upon him?

A. I did.

Q. Now, who arranged with the doctors themselves to make the examination, and who paid them for making it?

A. I arranged by correspondence with the doctors, and we paid the—the company paid the expenses both of Mr. Guerrero's trip to and fro, and the doctors' expenses, too.

Q. You made the arrangement on behalf of the company? A. Yes, sir. [81]

Q. And received the information that they furnished you? A. Yes, sir.

I saw the plaintiff after he returned from El Paso. He still had those dark glasses on. I could not see his eye. I did not have him take them off or make any examination. The Doctor Martin I speak of is a physician at Phoenix,—Dr. Ancil

(Testimony of Joseph P. Hodgson.)

Martin. He is a specialist in diseases of the eye. I requested his presence, but he is ill and could not come; that is the reason he is not here.

Mr. DUNSEATH.—No cross-examination.

Testimony of J. B. Gray, for Defendant.

J. B. GRAY, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is J. B. Gray. I reside at El Paso, Texas. I am a physician. I treat the eye, ear, nose and throat. I graduated from the University of Louisville, Louisville, Kentucky. I took my special work at Chicago, Eye, Ear, Nose and Throat College. I have practiced my profession twenty-seven years. I have devoted twenty years to my specialty. I have practiced in El Paso twenty years. I have seen great numbers of [82] eye cases during that time.

I recall having seen the plaintiff, Epifanio Guerrero, in March, 1919, at my office in El Paso. He was referred to me from Morenci. Phelps Dodge Corporation. I examined him at the request of Dr. Blatherwick, the head physician at the company's hospital at Morenci. When I examined the plaintiff, I was making the examination for the Phelps Dodge Corporation. They compensated me for my services. My records show that the plaintiff called at my office on March 5th, 6th, and, I think, 7th, in 1919. When the plaintiff came to my office my recollection is that someone was with him.

(Testimony of J. B. Gray.)

I don't remember who—some friend, I think.

I examined the plaintiff. Dr. Detweiler assisted me. He is also a specialist in eye cases. His office is in the same building as mine. Part of the examination was conducted in my office and part in his.

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Objection sustained.

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right, I will withdraw the rule and allow you to be heard. [83]

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and under the rule submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I recall one instance, at least, where such testimony was permitted in this court, the testimony of a physical examina-

(Testimony of J. B. Gray.)

tion, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition, which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating with his employer seeking [84] some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose if fully explained to the employee, the person supposed to be injured, and the arrangement has been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the information obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement, or possible negotiations. Now, if there is any element of confidence to that, it does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some

(Testimony of J. B. Gray.)

physical director or some athletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body, and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony [85] already given by Doctor Gray, shows absolutely no relation of physician and patient existed in this case. The privilege never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye or anything else about me; I will let him examine me with reference to an injury or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson

(Testimony of J. B. Gray.)

testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then perhaps we will be able to arrive at some settlement or something. You will have the facts more [86] to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as to his understanding, whether he did so agree before ruling on that.

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit?

The COURT.—I think so.

Mr. KEARNEY.—Just one question of Doctor Gray.

I am not in the employ of the Phelps Dodge Corporation. I am not employed by them down there. I am not in their pay. In this case, I am working for them. I called Dr. Detweiler in. We

(Testimony of Epifanio Guerrero.)
examined him together. Dr. Detweiler is not employed by the company that I know of. It is my opinion that he is not. I do not know.

Testimony of Epifanio Guerrero, on His Own Behalf (Recalled).

EPIFANIO GUERRERO, being recalled by his counsel by permission of Court, testified as follows: [87]

Direct Examination by Mr. KEARNEY.

I understood that I was being sent to El Paso to benefit my eye. It would do my eye some good, with the intention that I was to receive treatment for my eye. Most assuredly; how would I be in this fix? I paid hospital fees when I worked for the company.

The COURT.—I want to know if there was any understanding between this witness and any officer of the company at the time he left.

Mr. KEARNEY.—He says now, to get a better eye.

Cross-examination by Mr. MATHEWS.

The day that I left, the doctor sent me to El Paso and I got there at two-forty and I went to the doctor's right away and I left there the next day. They did nothing but examine me. I came back as soon as I was examined.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

(Testimony of Epifanio Guerrero.)

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. [88] He may believe anything. The true situation here is whether or not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Examination by the COURT.

Q. What, if any conversation, did you have with Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso?

A. Nothing.

Q. Did, or did he not request—did you not request of him or the company a settlement for the injury to your eye? A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir, he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

(Testimony of Epifanio Guerrero.)

A. No, sir, I have never been to El Paso after that. [89]

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer, to obtain a report from the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company do you mean?

A. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenci that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury?

A. No, sir, he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in that matter being evenly balanced; I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff [90] has given at this point is positively rebuttal. It is not a part of his main case.

(Testimony of Epifanio Guerrero.)

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what it is for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a *prima facie* case, or showing here, and a very strong one, that a certain state of facts existed which would take this entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such conversation with him, but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then after the showing is presented, the whole thing, under proper instructions, goes to the [91] jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go

(Testimony of Epifanio Guerrero.)

through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me. I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like anything else, or other situations, it is simply a matter for the jury, under the proper instructions from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in it finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground it is privileged.

The COURT.—I sustain the objection. [92]

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception.

Testimony of J. B. Gray, for Defendant (Recalled).

J. B. GRAY, being recalled as a witness for defendant, testified as follows:

Direct Examination by Mr. MATHEWS.

The examination was made partly in my office and partly in Doctor Detweiler's office.

Q. What instruments or equipment have you there for the purpose of making examinations?

Mr. KEARNEY.—I object to that as immaterial and irrelevant.

The COURT.—Objection sustained.

Mr. MATHEWS.—We ask for an exception.

Q. What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception.

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel [93] on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your reply, Doctor. Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

(Testimony of J. B. Gray.)

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further [94] examination. Just one more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

(Testimony of J. B. Gray.)

I have seen a great many hundreds or thousands of eye cases where injuries have happened to an eye. I have had experience where an injury occurred to an eye as a result of a blow, or as a result of it being struck with a rock or other hard substance.

Q. Suppose, Doctor Gray, a man were at work in the mine, hammering and breaking up rock or ore with an eight pound sledge-hammer, and in so doing broke off a piece of that rock or ore some three or four inches long and an inch or two thick of heavy rock with such force and violence that will cause that rock when struck and broken by the hammer, to fly off the main rock and hit him in the eye. What, ordinarily, would result in the way of outward appearance and injury to the parts around the eye?

A. The eye would become very red, and on close examination you could see where the rock had hit. There would be a contusion of the tissues of the eye. It [95] might rupture the blood vessels, and you would have inside hemorrhage.

Q. What mark or bruise would such a lick make around the surface of the eye?

A. It would cause some blood to collect under the skin.

Q. Resulting in what is commonly spoken of as a black eye? A. Yes, sir.

Q. When a rock of that sort struck a man in the eye with the force I have mentioned, would it or

(Testimony of J. B. Gray.)

would it not leave some permanent sign or mark on the eye ball itself?

A. Sometimes it would and sometimes it would not. It would depend upon the force.

Q. That would depend somewhat on the size and character of this rock, would it not?

A. Yes, sir.

Q. Whether the sharp edge struck, or what part struck?

A. Yes, and whether the lid was closed when it hit.

Q. Yes? A. Yes, sir.

Q. What would be the probable effect as to blindness resulting from such a blow?

A. Well, that would depend too upon the size of the body perhaps, and the force with which it was [96] coming and hit the eye.

Q. Would it necessarily cause blindness?

A. Not necessarily, no.

Q. If it was going to cause blindness, about what time would the blindness manifest itself?

A. The immediate effect of the blow would be the blindness; the blindness would be immediate upon the blow.

I understand the tests that are made by men in my profession to determine whether or not one can actually see with an eye he claims blindness in, one test which is relied on pretty closely is what they call the red-green test, red and green letters and with a red and green lense before the eye. If a man came to me or any other eye specialist and

(Testimony of J. B. Gray.)

claims he is blind in the left eye and able to see in the right eye, I would apply the tests, I would put my letters up, red and green letters up on the card, and put them up a certain distance, say sixteen or twenty feet and apply these red and green lenses in spectacle form and have him look at those letters. If he reads all of those letters he can see in both eyes, and if he did not with one eye and will only see certain letters, it depends whether the green or red lens before the good eye. That test is absolutely conclusive, I think. I don't believe he could deceive me. [97]

We have one other test, ordinarily known as the Fogging Test. A short focus strong convex lens before the good and a strong lense before the blind eye. If he was faking, if he were an imposter or faking, he would read correctly, although he was not conscious he was doing it with the bad eye. That is also regarded as conclusive. There is a test that is commonly relied upon with reference to the pupillary reaction of the light. The pupillary reflexes, we always examine the eye with the pupillary reflexes, of course. An eye that sees at all, will react. An eye that is absolutely blind, the chances are it will not, although it may. He may have a blind eye and still the pupil or pupillary reflex is normal. It might be a case where the eye is almost blind and still be some reflexes. I would not call that test conclusive. The others are regarded as conclusive.

Q. If you were called upon to examine a man

(Testimony of J. B. Gray.)

who was in court and where there was a question as to the genuineness of his blindness, would you consider your examination complete until you applied some of those tests that you have mentioned?

A. No, I would make those tests first.

Q. In all of those cases, you think one of those tests should be used? A. Yes, sir. [98]

Q. In a case of that sort, when the plaintiff was in court claiming to be blind in one eye, and he was being examined for the purpose of shedding light on this, would you consider it a complete examination by simply confining yourself to looking into the eye, and then using an ophthalmoscope and ophthalmometer and applying light to it?

A. No, I would not think it was complete.

Q. You are familiar with those instruments I have mentioned, I presume? A. Yes, sir.

Q. And with their purposes? A. Yes, sir.

Q. But they are not conclusive, an ophthalmoscope and ophthalmometer, to determine whether a man is blind or not in all cases?

A. I would say this, that they furnish much information, but you could not say positively by using them.

Q. Are they or not regarded as conclusive tests where a man is suspected or faking?

A. They are useful in arriving at it.

Q. But which ones are absolutely regarded as conclusive where a man is claiming injury of that kind?

A. I think those two that I have mentioned, red

(Testimony of J. B. Gray.)

and green test and the Fogging Test. [99]

Cross-examination by Mr. KEARNEY.

In response to your question if I were called upon to make an examination concerning the condition of a man's eye, and that is all that was stated to me, would I go through all of those tests, I will say, if you wanted an absolute opinion, I would take him through all those tests. In my examination as to the condition of a man's eyesight, I believe I would use all of those tests. Not all the time, but if I know or suspect he is faking, I would use all these tests. I don't always apply those tests.

The COURT.—What do you mean by "these tests," all three of them or two of them or one?

The WITNESS.—Well, the red and green test. I don't always do that to all patients who come into the office. I was present when Dr. Dulin testified. By the examination that he testified to making, I could tell whether the eye was normal or not in appearance by those instruments. You could not say positively whether he was blind or whether he was not blind. You could not say whether the pupil was normal or not, you could say whether it was diseased or not in appearance. I don't think you could say whether it was defective unless you found some diseased condition. It would show diseased condition [100] there, if it was there.

In stating in the early part of my examination that a blow on the eye with a rock would cause

(Testimony of J. B. Gray.)

immediate blindness, what I meant to say was that—I don't know whether I made myself very clear. Oftentimes, you get a blow upon the eye with a rock of that size and you get an internal hemorrhage into the eye and the chances are you will lose the vision right then by so much blood being thrown into the eye. It might not cause immediate blindness. I don't think as a rule you could figure on that causing gradual blindness. It might come on later. I question if it would,—if it would become worse. These bruises as a rule do not carry much infection. They are simply a bleeding under the skin and as a rule do not infect. If the eyeball or a part of the eye was destroyed you would get an infection. You might get an infection that would cause blindness. It would with an infection in the eye.

It is seldom that a blow is struck directly on the eyeball. In many eyes, the fact of the eye closing would protect it, but the fact that we get so many foreign bodies in the eye, shows that it does not close every time. I do not think that the lid protects the eye in so very many instances. It does in some.

Redirect Examination by Mr. MATHEWS.

I have seen cases where there was a roughness or irregularity in the clear part of the eye. In examining [101] a patient and finding that condition, when you do not know the cause, that fact alone would not enable one to say that the man is

(Testimony of J. B. Gray.)

blind. Many things might be the cause of such condition. You could get a roughness, a granulated lid or trichoma might give a roughness of the eyeball. It would not necessarily indicate that the man had received a blow on the eye or had a rock in his eye. You could get the roughness, it could happen from injury or other things. Such a condition might be caused by most anything, sand or any foreign matter in the eye. It would cause a roughness easily. A vein of the eye, a cornea rupture.

Testimony of D. W. Detweiler, for Defendant.

D. W. DETWEILER, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is D. W. Detweiler. I reside in El Paso. I practice medicine, limiting the practice to the diseases of the eye, ear, nose and throat. I graduated from the University of Iowa. For ten years I prepared for the practice of my specialty. I had two years of post-graduate in the hospitals of Chicago. I have engaged in the practice of my profession thirty-one years and of my specialty twenty years. I was located in Iowa, with the exception of two years in [102] Chicago, up to the year 1907, when I moved to El Paso, and have been there since. I have had a great many eye cases.

I first saw the plaintiff, Epifanio Guerrero, about the 6th of March, 1919, in the office of Doctor Gray,

(Testimony of D. W. Detweiler.)

in El Paso, and later in my office in the same city; that was the same Doctor Gray who was present here on the stand yesterday. I participated in the examination referred to. I was present in the courtroom yesterday when Doctor Gray was on the witness-stand. I heard him testify. I am the same Doctor Detweiler who was referred to in his testimony as co-operating with him in his examination of the plaintiff.

Mr. MATHEWS.—Now, if your Honor please, I suggest in order to save going through all of those questions and objections separately, that I may now ask counsel if they will stipulate that the record show the same questions regarding the examination may be considered as having been put to Doctor Detweiler as were put to Doctor Gray on yesterday, and the same objections and the same rulings?

Mr. KEARNEY.—We will stipulate this that any information elicited, or any communication that the plaintiff made to the witness as to any treatment or examination—

The COURT.—That is not what he asked you to stipulate. He asked you to stipulate that the [103] same questions may be regarded as asked of this witness that were asked of the other witness.

Mr. KEARNEY.—That is fair.

Mr. DUNSEATH.—We will stipulate this.

The COURT.—You do so stipulate, and the record may so show.

(Testimony of D. W. Detweiler.)

Mr. KEARNEY.—We agree that the record may so show.

The COURT.—And the ruling will be the same.

Mr. KEARNEY.—Will be the same.

I heard and remember that part of the examination of Dr. Gray in which certain hypothetical questions were put to him as to diseases of the eye, as to various methods and tests which may be applied to ascertain whether one was blind or not blind in one or both eyes. I agree with the conclusions which Doctor Gray announced here on the witness-stand. I have used the tests he spoke of many times. Within the past two years, since we have had the epidemic of influenza in the country, I have seen several patients who suffered with influenza. I have found in some cases that the influenza sometimes affects one's eyes or impairs one's eyesight.

Mr. MATHEWS.—You may cross-examine.

Mr. KEARNEY.—That is all, Doctor. [104]

Testimony of H. H. Starke, for Defendant.

H. H. STARKE, witness for defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. MATHEWS.

My name is H. H. Starke. I live in El Paso. I am a physician, specializing in the diseases of the eye, ear, nose and throat. I have practiced medicine twenty-four years and specialized fifteen years. I graduated from St. Louis University. As to

(Testimony of H. H. Starke.)

special work, I was in the General Hospital, Chicago General Hospital, Ophthalmic Hospital, from 1906 to 1908. Since that time I have practiced in El Paso.

I saw the plaintiff, Epifanio Guerrero, in court yesterday. I have seen him before in my office in El Paso, approximately a year ago.

Q. What was the occasion of his coming to you?

Mr. DUNSEATH.—We renew our objection againt before they go any further. We object to any statement made to this doctor, or any examinations made by him, or the results of any examinations, or any communications had with him by this plaintiff.

Mr. MATHEWS.—I don't want to bring out anything of the sort. I simply want to ascertain now whether the plaintiff did or did not consult the doctor professionally. [105]

The COURT.—He may answer that.

The WITNESS.—Why, he—

The COURT.—That is shown that would not—until that is shown it would not be a privileged communication.

Mr. DUNSEATH.—I object to it; that is all.

The WITNESS.—I saw the patient; he came in for me to examine his eyes.

Q. Now, without saying what the examination disclosed or what he said to you or anything of that kind, I wish to ask you, Doctor, whether or not you did make such an examination.

A. I examined him.

(Testimony of H. H. Starke.)

Q. Now, I will put a question which will probably be objected to, and the doctor need not answer promptly until the objection is made. What did you find as a result of that examination?

Mr. KEARNEY.—Now, we object to that as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication.

Mr. MATHEWS.—Defendant excepts.

The COURT.—Yes.

Mr. MATHEWS.—No further questions with the doctor.

Mr. DUNSEATH.—No questions.

Mr. MATHEWS.—The defendant rests.

AND THE DEFENDANT HERE RESTED ITS CASE. [106]

The COURT.—Gentlemen of the Jury, upon the application of the defendant, with the consent of the plaintiff, the Court has appointed Doctor Hardridge of Phoenix to make an examination of this plaintiff and make a report thereon. As he is making that examination at this time and it will take a little while. Doctor Morris, of Tucson, could not make the examination, and Doctor Hardridge was satisfactory to the plaintiff and defendant, so I think you may be excused until eleven o'clock.

Testimony of B. F. Hardridge, for Defendant.

B. F. HARDRIDGE, a physician selected by the Court, upon application of defendant and with the consent of plaintiff, having been first duly sworn, testified as follows:

(Testimony of B. F. Hardridge.)

Examination by COURT.

My name is B. F. Hardridge. I am an oculist. I graduated from the University of Pennsylvania. I practiced my profession exclusively from 1903 to 1913 at Philadelphia, and at Phoenix, Arizona, since that time. I have made a specialty of ophthalmic surgeon, oculist.

Q. Well, Doctor, you were appointed by this Court to make a careful examination of the plaintiff and to report to the Court and the jury the result [107] of such examination. You may now state to the jury exactly what you did, and describe without using any more technical terms than will be absolutely necessary, the result of such examination.

A. I examined the plaintiff in this case under very difficult circumstances; spent about three hours, in which he gave me a history of having received an injury of the left eye on January 10, 1919. He was treated at the local hospital for a short time, referred to an oculist in Phoenix, the name of whom he did not know, was examined once and returned the following day to Morenci, where he was treated again for a time, about twenty-five days. He was then sent to El Paso, where he remained over one day, receiving an examination and returned to Morenci where he was treated about three weeks. The superintendent then had an interview with him and offered him—

Q. You need not state anything about any conversation with the superintendent.

(Testimony of B. F. Hardridge.)

A. At the time of the injury, he complained immediately following that that he had a sensation of blindness and was unable to see anything. Since that time he has never been able to see, not even light. Early in his trouble he had severe pain in his eye which in the course of time subsided. Since then he has had periodic pains of a moderate degree, beginning in the left occipital region—that is, the [108] back part of the head, radiating to the eye. He claims previous to the accident he could see perfectly in both eyes, health always good, smallpox when a child. Recently he was examined by another oculist, the name of whom he did not know, and this morning by myself.

I examined him and I found both eyes responded to light, both pupils responded to light. I discovered that he can fix the head of a match with his left eye, and the right turning in. In covering the left eye, he then immediately fixed with his right eye. The interior chamber, that is, the front part of the inside of the eye, is normal. There are no scars about his face or eye. He has a teygrium of the left eye. I might explain that that is a little loose tissue growing over the cornea. I might also explain that that has nothing to do with the accident. It is a condition that may grow in spite of an accident or not related to an accident. I am speaking of the left eye. This applies to both eyes, and fixing a match stick or a small point claimed not to see beyond the median line. That is, to the left of the median line, yet his right eye

(Testimony of B. F. Hardridge.)

will follow the object at least eight inches to the left and twelve inches from the nose, indicating that he surely sees on the left side.

In the white part of the eye are spots which are present in both eyes and not in the one eye. These have probably no significance at all. The reason I lay stress on the fact, it is in the right eye the same [109] as the left, is to indicate that the condition is not confined solely to the injured eye.

In the matter of standardizing his vision, I was absolutely unable to do so for the following reasons: This man has been examined doubtless a great many times, is more or less familiar with the technique, rendering it very difficult for one to determine accurately. For example, in testing him with the confusing tests of the red and the green, he admitted once only, but I could not get him to repeat seeing red with the red lens in front of the left eye and the green lens in front of the right eye. The reason that I had difficulty in doing this and with other subsequent tests, was his absolute refusal to make answer to my questions. The Jackson Fogging Test, which is the placing of a high facus glass in front of the good eye with a weak lens in front of the left eye, but he refused to answer, claiming he could not see anything, not even light.

This same combination with the minus six in front of the right eye, he still persisted in refusing to even recognize light. I might explain that the minus six in front of his good eye absolutely

(Testimony of B. F. Hardridge.)

neutralized the plus six which I placed there previously, so that he could not have helped but at least seeing with his right eye. Yet he refused to admit all this.

Another test, the Prism Test. The prism [110] passed down in one eye, permitting him to walk about the room, but he absolutely refused, saying he was unable to do so. If the left eye was absolutely blind, he unquestionably could walk about the room with one good eye. The fact is the lens is confusing. With the Maddox Rod, that is a glass which gives a red streak in front of one eye, the right eye, with no glass in front of the left eye, he absolutely refused to admit he could see anything, even the red light. He admitted without any aid to the vision of six-six, at least in the right eye. That is, normal vision in the right eye, and I should have said further, and this really goes in with the first description, he has an internal squint. That is, his left eye turns in towards the nose. In radiating the eyes to the left, both eyes, I mean, the left eye will pass a short distance beyond the median line to the left. He will fix with the left eye, the right being turned in. This shows a weakness of the left external rectus, with an undoubted ability to see or fix with his left eye.

In the matter of field of vision, I was unable to get him to corroborate in seeing with the left eye any object whatever. With the right eye, however, I was able to obtain a very small field of vision; that is, passing probably from different

(Testimony of B. F. Hardridge.)

directions. Instead of seeing, for example, ninety degrees in the temporal region, he only admitted seeing [111] about ten degrees. Certainly this was conspicuous. Whether the carrier was brought in from the outer field, or carried in from the center, he stopped approximately at that point. I am speaking of the good eye now, the right eye. With the red color in the carrier he stopped at precisely the same point that he did with the white field. With blue, his vision was almost central to five degrees. The character of the field is absolutely misleading in that his blue field is smaller than the red. Also that the red field is the same size as his former field; this is absolutely inconsistent. A blue field is very much larger than red. I cite this regarding his right eye, his good eye, to indicate how very misleading and how difficult it is to collect different data regarding the case.

I also call your attention to the fact that the pupils are absolutely the same size on both sides, that they both react to light, which is absolutely certain that there is a degree of vision in both eyes, but as I stated a minute ago, I was absolutely unable to standardize the degree or amount of vision in his left eye.

From this examination, that is, looking inside of the eye, I had extreme difficulty, owing to the surrounding conditions, and also to the fact that I could not get him to keep his eyes still, but so far as I was able to determine, I found no pathological trouble inside of his eyes, either eye. The man has

(Testimony of B. F. Hardridge.)

an internal [112] squint which may or may not have been present at the time when the supposed injury occurred. To sum up, the man undoubtedly sees a certain amount with the left eye. I was not able to find any definite evidence of trauma. I don't think I have anything further.

Examination by Mr. KEARNEY.

I don't know how far the man could see with his left eye. I don't know whether the plaintiff could see me from where he sits with his right eye closed. I do not say how much the vision in his left eye is. I was absolutely unable to standardize. I do not want the jury to understand that it is impossible for a traumatic injury to cause the condition that I found in his eyes. It is possible that the injury might have been received from a blow to the eye, but hardly probable. I don't say that it could not occur, it is possible in so far as all things are possible. I have not seen anything like it. I didn't see any condition present of trauma or anything else.

Q. That may be, but that was a long time ago. This might have resulted from some infection?

A. But I didn't see anything that has resulted.

Q. Well, you found results that he cannot see; he hasn't very good vision in that eye?

A. He can't see? He can see. [113]

Q. Well, how much can he see?

A. I don't know; I am unable to standardize it.

Q. Can you say with any degree of positive cer-

(Testimony of B. F. Hardridge.)

tainty what caused the conditions in which you found his eye to-day?

A. Why, very likely I would be inclined to find that he had an internal squint.

Q. Well, do you know positively what did bring it on? A. No, I do not.

Q. You don't know? A. No, sir.

Examination by Mr. MATHEWS.

The only abnormal condition, as I stated, is an internal squint and the terygium. I explained that.

Q. Any other trouble that you heard of, you simply had his word for? A. Absolutely.

An internal squint is the turning of the eye in toward the nose; it is the simplest definition I can give. An internal squint sometimes comes from a blow, not always. The most frequent occurrence of squint is a congenital condition. Most cases are born that way. The presence of the squint is no evidence of injury unless you have fissures that go with it. Terygium is a fold of the loose tissues of the eye growing over the cornea. When you move the lid of the eye, [114] you see a little tissue there, a mucus membrane, and that grows over the cornea. It is very slow in its progress, usually, sometimes many years and sometimes it may develop within a comparatively short time, four or five years. Terygium does occasionally occur. I don't think in this instance that will follow. Say an ulcer of the cornea; some abrasion of the cornea. In this instance I don't believe it resulted from any trauma.

(Testimony of B. F. Hardridge.)

Q. Now, in the statement that you gave that the Court requested, and again in answer to counsel for the other side, you stated to the jury that you were unable to standardize this man's vision. Tell what degree of vision he possessed in his left eye. Now, will you state to the jury, if you can, why you were unable to do that?

A. I was unable to get a response from the gentleman to my questions.

Q. In order to apply the tests that you refer to?

A. Yes, sir.

Q. In order to get the degree of vision, or standardize the vision, it is necessary that there at least be some co-operation from the patient, is there?

A. Yes, sir.

Q. Had he answered the questions that you asked, responded to inquiries as you applied the tests, you are fully able to determine what that vision is, [115] are you not?

A. If the patient co-operates, certainly.

Q. It does require a degree of co-operation?

A. Yes, sir.

Q. And which you were unable to obtain from this man?

A. Yes, sir; as I explained, the first man that sees such a case as that, he is in a position to get good information, and a patient acquires a knowledge of techniques very readily. This man has been seen perhaps many times, which made it very difficult to determine.

(Testimony of B. F. Hardridge.)

Q. The oftener he is examined, the better he becomes educated?

A. Tests should be applied very quickly, and does not attract any attention.

Q. As to the vision of the left eye, you can only say that he sees some with that left eye?

A. I can only say that he sees some, indicated by the action of the iris to light, and the fact that the pupils are the same size. I am also led to believe so by reason of his absolute refusal when the eye is put to a confusion test before his eyes, to answer.

Q. In that test—you also applied a test where he claimed not being able to see light. What was the name of that test, Doctor? I think two tests where he was. [116]

A. That is the Jackson Fogging Test.

Q. Now, could or could not his answers have been true to that case? A. I didn't get the question.

Q. When he told you at the time of that test that he could not even see light, could his answer have been true?

A. No, that answer was absolutely wrong, because he had nothing but a plain glass to look through with his good eye, yet he absolutely refused to admit that he could see light, let alone any figures. I am referring to his good eye.

Q. Now, did he give any other answers, Doctor, which you are able to state to the jury were false?

A. In all of those confusion tests, he would not respond to those tests which I described, the carrying of the point of a match to the left of the median

(Testimony of B. F. Hardridge.)

line, twelve inches from the base of the nose, he denied being able to see it, and yet he fixed with his right eye, mark you, I am not speaking of the injured eye.

Q. Yes?

A. With the right eye, indicating, of course, that he was misleading me.

Q. It could not have been correct?

A. Oh, absolutely no.

Q. And there was a test where he refused to walk, claiming he was unable to walk?

A. Yes, sir. [117]

Q. Could that inability have been real, under the circumstances?

A. Well, I don't know. He did not walk, that is all I can say.

The COURT.—Were you speaking through an interpreter, Doctor?

The WITNESS.—Yes, sir.

The COURT.—The court interpreter, here?

The WITNESS.—Yes, sir.

I was in all about three hours examining him. I never comment at all in examining a patient. I make that a rule always to show no comment. If they fall down, it is up to the patient. So far as I was able, under the circumstances, to examine the patient, I could see no injury in the eye. I might add that I had extreme difficulty in examining the patient. That part of the examination was rendered difficult by the condition of the light and his inability intentionally or unintentionally, of holding

(Testimony of B. F. Hardridge.)

his eyes so that I could see them. I tried for certainly an hour and a half to examine his eyes.

Examination by the COURT.

Q. Are you able, Doctor, to tell the Court and jury what, in your opinion, has brought about the condition of this plaintiff's left eye, if you can? [118]

A. I am not able to state clearly what brought this condition about. It may have been congenital.

Q. That is, he may have been born with it?

A. Born with it. There are instances of muscular disturbances which is not determined until some determining factor may produce it. Whether that is true in this case or not, I don't know.

Examination by Mr. MATHEWS.

I am of the opinion that the vision in his left eye is distinctly under normal. I might qualify that by saying that such eye are embryonic. That is, very much less than normal. As to my opinion of his statement that he was wholly unable to see with his left eye, I will say, in a measure you have got to make some estimate of the mentality of the person in forming an opinion of that sort. We are all given to being misled, but I don't know that I just grasp what you mean. Whether intentionally or unintentionally, when he stated that he was wholly unable to see with his left eye, he stated something which I have now found is not correct. He may be deluded in his own mind. Whether he has stated conscientiously the truth or untruth, I don't

(Testimony of B. F. Hardridge.)

know. I know he has a certain amount of vision there. [119]

Examination by Mr. KEARNEY.

Q. You said that condition of the squint might be caused by some outside force other than the condition with which he was born. Can you say that the muscles—you said that the muscles in that eye might originate or might cause a squint from some outside force?

A. I said that there are instances. I didn't say that this was an instance.

It would be possible to bring it about by a trauma, such conditions have been produced by trauma, but there you have paralysis of the muscles. Here we have a weakness of the external muscles and not a paresis. A weakness is a muscle while good, but which soon tires out itself whenever force is supplied, where a muscle that has paresis or paralysis, there is a continued degeneration of the nerve supply to that muscle. That will never recover.

I did not detect any evidence of blows or tenderness other than normal. He did not wink when I touched his eye, showing no evidence of pain. I did not say he could not keep his eye open; I said that he would not. I don't know the cause of his not doing so. If I examined a man's eyes three hours constantly, it would tire his eyes, but his eyes were not examined three hours constantly; I said I spent [120] three hours with this man. It was abso-

lutely necessary in order to carry on this work that I give him a rest between. I don't know what the intervals of rest were.

Mr. KEARNEY.—That is all.

And this was all the evidence introduced upon the trial of said issues.

Thereupon, defendant requested the Court to charge the jury as follows, which the Court refused, the defendant saving an exception.

Gentlemen of the jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments, or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sustain it. In this case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under [121] the law, was required to sustain the objection. The fact that the plaintiff has made the objection, and has thereby kept these physicians from testifying is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

Thereupon, the Court charged the jury as follows:

Gentlemen of the jury, this is an action brought by the plaintiff against the defendant to recover the sum of twenty thousand dollars for an alleged personal injury he claims to have received while in the employ, and while doing work for the defendant. The plaintiff's complaint has been read in your presence and hearing, and I believe it is unnecessary to again read it. You will probably remember what the material allegations are.

The defendant denies the allegations of plaintiff's complaint, and thereby the issue is made, and the burden is upon the plaintiff to prove his case as alleged in his complaint.

As has been told you by counsel, you are made the sole judges of the facts in the case, and of the credibility of each and all of the witnesses who have testified in the case, and as to what weight you [122] will give to the testimony of the several witnesses. In determining the credibility of any witness, and the weight you will give to his testimony, you have the right to take into consideration, and you should take into consideration the manner and appearance while giving his testimony; his means of knowledge; any interest or motive which he may have in the result of the case, if any be shown, and the reasonableness and probability of the truth of his statements when considered in connection with all the other facts in the case. If you believe that any witness has wilfully sworn falsely to any material fact in the case, it is within your province

to entirely disregard the testimony of such witness except in so far as he may be corroborated by other credible evidence in the case, or by the facts and circumstances in evidence. And when I speak of the witnesses, I mean to include the plaintiff, because the plaintiff has offered himself as a witness in his own behalf. You will take his testimony as you would that of any other witness, taking into consideration the fact that he is interested in the result of the case, and determine whether or not that interest in anywise affects his testimony, or causes him to be biased, or has caused him to overstep the truth, or withhold the truth. The same rule may be followed in determining what, if any, credence you will give to the testimony of any of the witnesses for the defendant. You will not disregard the testimony [123] of the plaintiff merely because he is the plaintiff, nor should you disregard the testimony of the witnesses for the defendant, or such of the witnesses for the defendant as are employees, merely because they are such, and it will be your duty in this case in arriving at a verdict to be governed by the facts, the evidence and the law, regardless of the fact that the plaintiff is an individual and a poor man, and that the defendant is a corporation and the owner of large properties, if it is a fact—regardless of the condition of the parties financially, and regardless of the effect of your verdict upon the parties or either of them.

Before a verdict in any amount can be rendered in favor of the plaintiff, and against the defendant, he must establish by a preponderance of the evidence

—that is, the greater weight of the evidence—first, that the accident by him complained of actually occurred, and was due to a condition or conditions of his occupation. And second, that the accident was not caused by his negligence. If you do not find that there was an accident, as he claims, then you stop right there, and you need not go any further in the case at all. Now, by "the burden of proof," wherever used in these instructions, and I tell you the burden of proof is upon the plaintiff, and that is always the case where the plaintiff brings a suit—by "burden of proof," I say is meant that the party upon whom the burden of [124] proof devolves must prove the allegations of his contention by a preponderance of evidence. That is, by the greater weight of evidence. It does not mean necessarily that there shall be a greater number of witnesses on the one side than the other, but it means of the more convincing force.

Now, this action has been brought under what is known as the Arizona Employers' Liability Law. Under the provisions of this act, and under this act alone, can the plaintiff recover in this action. If he does not bring himself within its provisions, then, regardless of the fact that he may bring some other kind of an action, he cannot recover in this case. It makes no difference whether he might recover under the Workman's Compensation Act, the common-law act or negligence, but he has elected to bring his action under this law, and under this he must make good his contention. Now, under the provisions of that act, an employer in certain dan-

gerous occupations, among them mining, is liable for the personal injury of an employee for an act arising out of and in the course of such dangerous and hazardous employment, and due to a condition or conditions of such employment in all cases in which the injury of such employee shall not have been caused by the negligence of the employee injured. I charge you as a matter of law that the occupation of the plaintiff, that of mucker or miner, whichever he was at the time he was employed by the defendant, is [125] a dangerous occupation within the meaning of this Employers' Liability Law. Now, the first question then to determine is whether or not the plaintiff at the time and place mentioned in his complaint, and as alleged therein, did receive injuries to his eye as he claims. That is, he alleges that he received it a result of a blow, and he sets forth in his complaint how that occurred. It is for you to determine, as I said before, whether or not any accident did occur, and how it occurred, if at all, and if an accident did occur, then whether or not it was as he has alleged in his complaint, and if such did occur, whether or not that accident caused any injury to his left eye as he complains of in the complaint. Now, if you believe that he was so injured, and that it was caused or suffered by reason of an accident, and such an accident as is set forth in his complaint, then you must consider and determine whether or not it was caused by his negligence, because if it was caused by his negligence, he, of course, could not recover under this particular law. Now, if you find from the testimony, and from

that alone, that the plaintiff, at the time and place mentioned in his complaint, sustained the injury set forth in his complaint, and that such injury was not the result of his negligence, then, and not until then, you would proceed to consider the nature and extent of his injury. Now, as I said before, the injury for which you award damages to the plaintiff, [126] must, by a preponderance of the evidence, be shown to have been sustained as a natural and proximate result of such accident, if one took place.

Now, as stated, you are the sole judges of whether there was an accident, and whether the accident was such as is complained of by the plaintiff in his complaint, and also as to the extent and the degree of the injury, if any was sustained. That is, whether or not it was permanent in character, and as to what extent, if any, by reason of such injury, the plaintiff has suffered physical pain and anguish, or both, and also as to what extent, if at all, he has, by reason of such injury, he has been disabled and incapacitated from following his usual vocation as described in the complaint, and whether or not he is incapacitated from following any other occupation by reason of the loss of one of his eyes.

If you find that the plaintiff is entitled to recover, the amount of the recovery, if any, is for you to determine from all the facts, circumstances and conditions. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, but it is for you to say, in the exercise of sound discretion, from all the facts, after considering and hearing all the evidence produced before you, with-

out fear and without favor, without partiality or any consideration of the result of the verdict, and without passion or prejudice, what amount of money will reasonably compensate [127] him for the damages, if any, he has sustained. In the ascertainment of damages, the law does not lay down any definite mathematical rule. It says that you, the jury, must be governed by sound sense and good judgment, and make such award of damages, if any, as would be just compensation.

The American Mortality Tables have been introduced by the plaintiff in this case. These tables may only be considered in the event you determine that there was an accident, and that there was a permanent injury. They are never to be considered in cases where the injury is temporary only. Now, in order to give you some idea as to the value of those tables, I will read you what has been said on the subject: "The expectancy of life is ascertained by the average mortality of large numbers, and for convenience these averages are gathered into tables called Life or Mortality Tables. They are permissible in evidence whenever the possible duration of a person's life is material in the case. In actions for personal injury, when the injury is of a permanent character, and in actions for death by wrongful acts, in estimating damages, the expectancy of life of the person injured is an essential element, and to show such expectancy, standard mortality tables are admissible in evidence." If the plaintiff were in a more hazardous employment than the persons from whom the tables were made, it is a circum-

stance to be taken into consideration by the jury as tending to show that his expectancy of life was less than the tables would [128] indicate to one injured by reason of his hazardous occupation, but the tables are none the less admissible on that account. The tables are not conclusive upon the question of the duration of life, but are competent to be weighed with other evidence, such as the physical condition of the person, the general health, his vocation in life with respect to dangers, his habits, and other facts that would probably enter into the probable duration of his life. Whether there is any definite rule in making that estimate or calculation in Mexico, or any difference in the duration of the life of a person of Mexican birth, I don't know, and I will leave that for you to determine. I have been furnished with no information on the subject, and as I said before, these are American Tables. If you have in your experience or observation anything which will enable you to more easily determine the matter, you may consider it in connection with the tables, and all the other elements in the case. And as above stated, if you find for the plaintiff, you should award a fair and reasonable compensation, taking into consideration what the plaintiff's income was at the time of the injury, what it was before that time, if shown, what it would probably have been in the future, how long it would last, whether it was likely he would accumulate anything at the wages he was receiving, or whether he would be steadily employed, or whether he would become [129] ill and thereby lose wages by reason of such illness; whether or not previous

to this injury he had been ill or lost any time, and if so, the cause of the sickness or illness, and are to consider all contingencies to which he was liable.

Something has been said in this case, gentlemen, with reference to certain testimony offered by the defendant. Counsel for both plaintiff and defendant have referred in argument to the testimony of certain physicians. The plaintiff in this case has testified that while he was in the employment of the defendant, he received a certain injury to his eye; that thereafter he consulted a physician regarding such injury, and received certain treatment. The defendant then offered the testimony of those physicians, or some of them, which, under the law, the defendant had a right to do. That evidence would have been admissible, and is admissible under the law, and they had the right to offer it, unless the plaintiff objected to it. The plaintiff did object to this testimony, which, under the law, he had the right to do on the ground that the testimony of such witnesses was privileged, and the law on that question is that a physician or surgeon cannot be examined without the consent of his patient as to any communication made by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by personal examination of such patient, provided, that is, the person offers himself [130] as a witness and voluntarily testifies with reference to such communication, that is to be deemed a consent to the examination of such physician or attorney. I say that the defendant company was within its rights in offering this testimony, and

had there been no objection, it would have been admissible and legal testimony. On the other hand, the plaintiff had the right, if he saw proper to do so, had the legal right to object to such testimony being offered to the jury under the statute which I have read to you, and in doing so, he was within his rights, and the objection was sustained and the evidence was excluded, and that is all there is to it.

Now, if from all the facts in the case, and the law as I have stated it to you, you come to the conclusion that the plaintiff sutained the injury that he complaintd of at the time and place alleged in the complaint, I say, if you come to that conclusion, and come to the conclusion that he is entitled to recover some amount for such injury, you must not render a quotient verdict. That is, you must not add together the amounts or sums each of you believe he is entitled to and divide it by twelve or any other number. Such or any similar method of arriving at his compensation would not be in accordance with law. That does not mean that if you come to the conclusion that he is entitled to compensation that you may not express your ideas on that subject, but it means that [131] you must not arrive at it by adding together the several sums and dividing them by twelve. That is known as a quotient verdict. Now, all of you have heard of it and read of it, and such a verdict should never be rendered in any case.

Now, in arriving at a verdict in this case, if you come to the conclusion that the plaintiff is entitled to any compensation at all, you have no right to

say, "I would not lose my eye for twenty thousand dollars," or "I would not have lost my eye for ten thousand dollars," or any other sum. That is not the proper method of arriving at damages. Perhaps a man would not take a million dollars for one of his eyes. Perhaps he would not have his arm taken off, if he were a normal man, for a million dollars, but that is not the question. Certain people, as the progress of the world continues, have got to engage in those hazardous occupations. The policy of the law is that if a man receives an injury working for corporation or for an individual, so far as that is concerned, because this law applies to individuals as well as corporations, and if one of you owning a mine and hiring men in hazardous occupations, you are liable under this law just as a corporation, therefore the policy of the law is that if a corporation or an individual desires to engage in a hazardous occupation, he is responsible for all expenses which arise in and growing out of the conduct of such business; the operation of such business in all cases in which the injury [132] was not caused by the plaintiff's own negligence. And if such accidents occur, and if such injuries are sustained for which damages are to be awarded, they should be such damages as are compensation for the injuries received. They cannot, under the law, be awarded in the way of punishment against an individual or a corporation, and if you find a verdict for the plaintiff in this case, you should find a sum which would be just compensation for the injury sustained. No more; no less.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly impaneled and sworn in the above-entitled cause, do find for the plaintiff, and assess his damages at" so many dollars, inserting therein the amount for which you find for him. If you find for the defendant, the form of your verdict will be, "We, the jury, find for the defendant," and have that verdict signed.

Now, should you not agree on a verdict, by six o'clock, the marshal will order your dinners, and later go to bed in such place as he may have arrangements made, and you must not separate. Under the law, after a case goes to the jury, the jury must not separate without the consent of both plaintiff and defendant and the Court.

Any exception on the part of the plaintiff?

Mr. KEARNEY.—We have none. [133]

The COURT.—Any on the part of the defendant?

Mr. MATHEWS.—None to the charge given, your Honor, but we request an exception to the Court's failing to give our requested instruction.

The COURT.—I think I covered that in the main charge.

Mr. MATHEWS.—I would ask that I may have an exception.

The COURT.—You may have an exception. That is all, gentlemen; you may go to the jury-room.

Thereupon the jury retired to consider their verdict and thereafter the said jury returned into

open court and rendered their verdict in favor of plaintiff.

Thereafter, defendant moved the Court to grant it a new trial on the following grounds, to wit:

I.

That the Court erred in holding that the plaintiff had not waived the privilege as to the communications between the defendant's witness, Doctor H. W. Rice, and the plaintiff, and that the matters sought to be elicited were privileged.

II.

That the Court erred in holding that the privilege had not been waived by the examination of the [134] defendant's witness, Dr. H. W. Rice, nor by the testimony of the plaintiff.

III.

That the Court erred in holding that the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray and Dr. D. W. Detweiler and Dr. H. H. Starke.

IV.

That the Court erred in holding that the matter sought to be elicited from each of said witnesses was privileged.

V.

That the Court erred in holding that the burden of proving such relation did not exist was on the defendant.

VI.

That the Court erred in changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the de-

fendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in rebuttal and not plaintiff's case in chief. [135]

VII.

That the Court erred in passing on a question of fact and taking it from the jury.

VIII.

That the Court erred in weighing the evidence and determining the credibility of the witnesses.

IX.

That the Court erred in holding the evidence to be evenly balanced on the question presented.

X.

That the Court erred in excluding the testimony offered after holding that the evidence was evenly balanced.

XI.

That the Court erred in excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. H. B. Gray, and the plaintiff.

XII.

That the Court erred in holding the question presented to be one of admissibility or competency [136] and not of weight or credibility.

XIII.

That the Court erred in, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

XIV.

That the Court erred in refusing and failing to give the instruction to the jury as requested by defendant.

But the Court overruled said motion for new trial, to which ruling of the Court, defendant then and there excepted.

And defendant, having tendered this, its bill of exceptions, and having prayed the Court to allow and sign and seal same, and said bill of exceptions having been examined by the Court and found correct, the same is accordingly allowed, signed, sealed and made a part of the record this 31st day of August, 1920.

WM. H. SAWTELLE,
United States District Judge. [137]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Certificate of Judge and Stipulation of Counsel.

Due service of the foregoing bill of exceptions in the above-styled cause is hereby admitted, and it is hereby stipulated and agreed that the said bill of exceptions is settled between counsel as a true

bill of exceptions in said cause, this 30th day of August, 1920.

L. KEARNEY,
JAMES R. DUNSEATH,
Attorneys for Plaintiff.
ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant. [138]

I, William H. Sawtelle, Judge of the United States District Court for the District of Arizona, hereby certify that the foregoing bill of exceptions in the above-styled cause is a true bill of exceptions.

WM. H. SAWTELLE,
District Judge.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Bill of Exceptions. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [139]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,
Plaintiff,
vs.
PHELPS DODGE CORPORATION, a Corporation,
Defendant.

Petition for Writ of Error.

To the Honorable WILLIAM H. SAWTELLE, District Judge:

The above-named defendant, feeling itself aggrieved by the final judgment herein entered against it and in favor of the above-named plaintiff on the 14th day of May, 1920, prays that a writ of error be allowed to defendant, from the United States Circuit Court of Appeals for the Ninth Circuit, to review said final judgment, and that such writ of error be ordered to operate as a supersedeas, upon defendant giving such security as may be required.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Petition for Writ of Error. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [140]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Assignment of Errors (Copy).

Comes now the above-named defendant and makes and files this, its assignment of errors, upon which it will rely on the prosecution of its writ of error to review the judgment herein rendered on the 14th day of May, 1920.

I.

The Court erred in sustaining plaintiff's objection to defendant's cross-examination of plaintiff, and excluding the answers elicited by such examination, by which defendant proposed to show that the plaintiff's left eye was not in the condition plaintiff testified that it was, and that plaintiff did not state such to be its condition when his left eye was examined by the defendant's witness, Dr. H. W. Rice; that any communication made [141] by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician, was not with reference to any physical or supposed physical disease of plaintiff. For this purpose, the defendant propounded the following question and the following discussion ensued:

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on examination of his counsel has already voluntarily described not only his acts in going to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony, on account of some water he says Doctor Rice put in his eyes being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's counsel, and I [142] must confess that I don't know at this time whether calling for

that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained?

The COURT.—Yes.

Mr. MATHEWS.—May the record show our exception, your Honor.

The COURT.—Yes.

II.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. W. Rice, and excluding such testimony [143] offered by defendant by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor H. W. Rice, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question and the following discussion ensued:

> Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?
>
> Mr. KEARNEY.—We object; it is a privileged communication.
>
> Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter. [144]

The COURT.—Yes; the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.

The COURT.—No; he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

Mr. MATHEWS.—I would suggest that we do not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only

question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privileged. We could [145] not consistently.

Discussion.

The COURT.—I will sustain the objection for the present.

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

III.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness, Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to

any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, [146] the defendant propounded the following question and the following discussion ensued:

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Objection sustained.

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right, I will withdraw the rule and allow you to be heard.

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute, does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and under the rule submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I

recall one instance at least where such testimony was permitted in this court, the testimony of a physical examination, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of [147] situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating with his employer seeking some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose, if fully explained to the employee, the person supposed to be injured, and the arrangement has been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the information obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement, or possible negotiations. Now, if there is any element of confidence to that, it

does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some physical director or some athletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body, and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony already given by Dr. Gray shows absolutely no relation of physician and patient existed in this case. The privilege [148] never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye or anything else about me; I will let him examine me with reference to an injury or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I

give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then perhaps we will be able to arrive at some settlement or something. You will have the facts more to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as to his understanding, whether he did so agree before ruling on that. [149]

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit?

The COURT.—I think so.

EPIFANIO GUERRERO, being recalled by

counsel for the plaintiff, by permission of the Court, and having been heretofore duly sworn, through the interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

Q. When you went to El Paso, what did you understand you were going there for? Did you understand that you were going there to have your eye treated?

Mr. MATHEWS.—Your Honor ,we object to that.

The COURT.—The first part of the question is perfectly proper, I think, but the latter part of it is objectionable. His understanding of what he was going there for is proper.

Q. What did you understand you were being sent to El Paso for?

A. To benefit my eye; it would do my eye some good.

Q. Did you believe when you went there that you were to receive treatment for your eye, or try to better your eye or not?

A. Yes, sir; with that intention.

Q. You went there for the purpose of receiving some benefit to your eye?

A. Yes, sir; most assuredly. How would I be in this fix?

Q. Did you pay hospital fees when you worked for the company? A. Yes, sir.

Q. And that goes to help keep up the hospital by the doctors there?

The COURT.—I want to know if there was

any understanding between this witness and any officer of the company [150] at the time he left.

Mr. KEARNEY.—He says now, to get a better eye.

The COURT.—You may cross-examine him, if you so desire.

Cross-examination by Mr. MATHEWS.

You only stayed in El Paso one day, I believe you testified?

A. The day I left, the doctor sent me to El Paso, and I got there at two forty and I went to the doctor right away, and I left there the next day.

Q. They did nothing to you but examine you, did they? A. That is all.

Q. You came back as soon as he examined you, did you?

A. Yes, sir, sure; I was going down on some business.

Mr. MATHEWS.—No further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. He may believe anything. The true situation here is whether or

not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Q. What, if any, conversation did you have with Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso? A. Nothing. [151]

Q. Did, or did he not, request—did you not request of him or the company a settlement for the injury to your eye? A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir; he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

A. No, sir, I have never been to El Paso after that.

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer to obtain a report from

the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company, do you mean?

Q. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenci that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury? [152]

A. No, sir, he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in the matter being evenly balanced, I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff has given at this point is positively rebuttal. It is not a part of his main case.

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what is it for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a

prima facie case, or showing here, and a very strong one, that a certain state of facts existed which would take this case entirely out of the privileged communications. Now, in rebuttal—it does not matter when it happened—the plaintiff is permitted, out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such a conversation with him; but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then, after the showing is presented, the [153] whole thing, under proper instructions, goes to the jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me. I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like anything else, or other situations, it is simply a matter for the jury, under the proper instruction from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception. [154]

The Court erred in said ruling in holding:

(a) That the matter sought to be elicited was privileged.

(b) That the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(c) That the burden of proving that such relation did not exist was on the defendant.

(d) In changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the defendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in chief and not rebuttal.

(e) In passing on a question of fact and taking it from the jury.

(f) In weighing the evidence and determining the credibility of witnesses.

(g) In holding the evidence to be evenly balanced on the question presented.

(h) In excluding the testimony offered after holding that the evidence was evenly balanced.

(i) In excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(j) In holding the qusetion presented to be one of admissibility or competency, and not of weight or credibility. [155]

(k) In, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

IV.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness, Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was

not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, the defendant propounded the following question and the following discussion ensued: [156]

Q. What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception.

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your

reply, doctor. Did you and Doctor Detweiler, or either of you, on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye? [157]

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further examination. Just one more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

V.

The Court erred in holding that the matters sought to be elicited by defendant's question, "What sort of an examination did you put the plaintiff through?" propounded to the defendant's witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered 3 herein, was privileged to the plaintiff.

VI.

The Court erred in placing the burden of proving that the relation of physician and patient did not exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff, upon the defendant. [158]

VII.

The Court erred in excluding the testimony offered by defendant through its witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered three herein, after holding the evidence as to the relation of physician and patient between defendant's said witness and the plaintiff to be evenly balanced.

VIII.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. H. Starke, and excluding such testimony offered by defendant by which defendant proposed to show that any communication made by the plain-

tiff to the defendant's witness, Doctor H. H. Starke, or any examination of plaintiff by such physician was not with reference to any physical or supposed physical disease of the plaintiff. For the purpose of eliciting this testimony defendant propounded the following question:

> Q. Now, I will put a question which will probably be objected to and the Doctor need not answer promptly until the objection is made. What did you find as a result of that examination?
>
> Mr. KEARNEY.—Now, we object to that as privileged.
>
> The COURT.—Objection sustained on the ground it is a privileged communication. [159]
>
> Mr. MATHEWS.—Defendant excepts.

IX.

The Court erred in refusing and failing to give the following instruction to the jury, as requested by the defendant:

> Gentlemen of the jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments, or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sustain

it. In this case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under the law, was required to sustain the objection. The fact that the plaintiff has made this objection, and has thereby kept these physicians from testifying, is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

WHEREFORE, defendant prays that said judgment be reversed.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Defendant's Attorneys.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Assignment of Errors. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [160]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Order Allowing Writ of Error.

On motion of Ellinwood & Ross, attorneys for the above-named defendant, it is hereby ordered that a writ of error be allowed to defendant from the United States Circuit Court of Appeals for the Ninth Circuit, to review the final judgment herein entered against defendant and in favor of the above-named plaintiff on the 14th day of May, 1920, which writ of error shall operate as a supersedeas, upon defendant giving security, as required by law, in the sum of Thirty-five Hundred ($3500.00) Dollars.

Dated this 2d day of September, 1920.

WM. H. SAWTELLE,
District Judge.

[Endorsements]: Order Allowing Writ of Error. (Case of Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, Defendant.) Filed Sept. 2, 1920. C. R. McFall, Clerk United States District Court, for the District of Arizona. [161]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Phelps Dodge Corporation, a corporation, as principal, and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Epifanio Guerrero, his heirs, executors, administrators and assigns, in the sum of Thirty-five Hundred Dollars ($3500.00), for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of August, 1920.

WHEREAS, the above-named Phelps Dodge Corporation has prosecuted a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final judgment of the District Court of the United States for the District of Arizona, entered in the above-entitled cause on the 14th day of May, 1920;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Phelps

Dodge Corporation shall [162] prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

PHELPS DODGE CORPORATION,
By E. E. ELLINWOOD,
Its General Attorney,
Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By T. A. HUGHES, [Seal]
Its Attorney in Fact,
Surety. [163]

State of Arizona,
County of Cochise,—ss.

T. A. Hughes, being duly sworn according to law, deposes and says: The United States Fidelity & Guaranty Company is a corporation duly organized and existing under the laws of the State of Maryland, having power to guarantee bonds and undertakings in judicial proceedings. Said Company has fully complied with all the laws of the State of Arizona in that behalf and is duly authorized and empowered under the laws of said State to execute the foregoing bond as surety thereon. I have executed said bond as attorney in fact for said Company, being by said Company thereunto duly authorized.

(Signed) T. A. HUGHES.

Subscribed and sworn to before me this 28th day of August, 1920.

[Seal] LOUIS C. RUPP,
Notary Public.

My commission expires July 13, 1924. [164]

The foregoing bond is hereby approved, both as to sufficiency and form, this 31st day of August, 1920.

WM. H. SAWTELLE,
District Judge. [165]

KNOW ALL MEN BY THESE PRESENTS: That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint T. A. Hughes, of the City of Bisbee, State of Arizona, its true and lawful attorneys in and for the County of Cochise, for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this power of attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said T. A. Hughes may lawfully do in the premises by virtue of these presents.

IN WITNESS WHEREOF, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its vice-president and assistant secretary, this 7th day of May, A. D. 1918.

UNITED STATES FIDELITY AND GUARANTY COMPANY.

By (Signed) W. W. SYMINGTON,
Vice-president.

[Seal] (Signed) C. J. McFEE,
Assistant Secretary.

State of Maryland,
Baltimore City,—ss.

On this 7th day of May, A. D. 1918, before me personally came W. W. Symington, vice-president of the United States Fidelity and Guaranty Company, and C. J. McFee, Assistant Secretary of said company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland; that they, the said W. W. [166] Symington and C. J. McFee, were respectively the vice-president and assistant secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing power of attorney; that they each knew the seal of said corporation; that the seal affixed to said power of attorney was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that they signed their names thereto by like order as vice-president

and assistant secretary, respectively, of the company.

My commission expires the first Monday in May, A. D. 1920.

[Seal] (Signed) A. D. PATRICK,
Notary Public.

State of Maryland,
Baltimore City,—Sct.

I, Stephen C. Little, Clerk of Superior Court of Baltimore City, which court is a court of record, and has a seal, do hereby certify that A. D. Patrick, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgment of proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said notary, and verily believe the signature to be his genuine signature.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a court of record, this 7th day of May, A. D. 1918.

[Seal] (Signed) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

[167]

COPY OF RESOLUTION.

THAT WHEREAS, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and au-

thority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

THEREFORE, BE IT RESOLVED, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys in fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

ALSO in its name and as its attorney or attorneys in fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provvinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise be allowed, required or permitted to

be executed, made, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in [168] the nature of either of the same.

I, C. J. McFee, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolutions the foregoing is a true copy and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 7th day of May, A. D. 1918.

[Seal] (Signed) C. J. McFEE,
Assistant Secretary.

I, C. J. McFee, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said Company to T. A. Hughes, of Bisbee,

Arizona, authorizing and empowering him to sign bonds as therein set forth.

GIVEN, under my hand and the seal of said Company, at Baltimore, Maryland, this 7th day of May, A. D. 1918.

C. J. McFEE,
Assistant Secretary.

[Endorsements]: Epifanio Guerrero, Defendant, vs. Phelps Dodge Corporation, a Corporation, Defendant. Bond on Writ of Error. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [169]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court of the United States for the District of Arizona, before you, between Epifanio Guerrero, plaintiff, and Phelps Dodge Corporation, a corporation, defendant, a manifest error hath happened, to the great damage of the said Phelps Dodge Corporation, as by its complaint appears, we being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done. [170]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 2d day of September, in the year of our Lord one thousand nine hundred and twenty.

C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that a copy of the foregoing writ of error was this day lodged in my office by Phelps Dodge Corporation, a corporation, plaintiff in error, for Epifanio Guerrero, defendant in error.

WITNESS my hand and the seal of said Court, this 2d day of September, 1920.

C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

[Endorsements]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Writ of Error. Filed Sep. 2, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [171]

In the District Court of the United States, for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Citation on Writ of Error (Copy).

United States of America,—ss.

To Epifanio Guerrero, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Phelps Dodge Corporation, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected,

and why speedy justice should not be done to the parties in that behalf. [172]

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 2d day of September, 1920.

WM. H. SAWTELLE,
United States District Judge.

Service of the foregoing citation is hereby acknowledged, this 8th day of September, 1920.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff.

[Endorsement]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corp., a Corporation, Defendant. Citation on Writ of Error. Filed Sep. 2, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [173]

In the District Court of the United States, for the District of Arizona.

EPIFANIO GUERRERO,
Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the District Court of the United States for the District of Arizona:

You are hereby requested to prepare a transcript

of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the writ of error issued in said cause, and to incorporate into such transcript the portions of the record indicated below, to wit:

(1) Plaintiff's complaint.
(2) Defendant's answer.
(3) Plaintiff's amended complaint.
(4) Defendant's special demurrer to amended [174] complaint.
(5) Plaintiff's motion to strike special demurrer to amended complaint.
(6) Minutes of May 14, 1920, showing trial of issues, verdict rendered thereon and judgment entered pursuant to such verdict.
(7) Motion for new trial.
(8) Minutes of June 24, 1920, showing order overruling defendant's motion for new trial and defendant's exception to such ruling.
(9) Bill of exceptions and attached stipulation.
(10) Petition for writ of error.
(11) Assignment of errors.
(12) Order allowing writ of error.
(13) Bond on writ of error.
(14) Writ or error.
(15) Citation on writ of error.
(16) This praecipe and attached stipulation.

You are also hereby requested to annex to said transcript, and transmit therewith to the Clerk [175] of the United States Circuit Court of Ap-

peals for the Ninth Circuit, the original writ of error, the original assignment of errors, and the original citation, together with the acknowledgment or return of service annexed thereto.

Dated this 31st day of August, 1920.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant.

Service of the foregoing praecipe is hereby acknowledged this 1st day of September, 1920.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff. [176]

In the District Court of the United States, for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION,

Defendant.

Stipulation Re Praecipe for Transcript of Record.

It is hereby stipulated and agreed by and between the attorneys for plaintiff and the attorneys for defendant in the above-entitled action that the portion of the record herein, as set forth in the foregoing praecipe, shall constitute the transcript of

record on writ of error in the above-entitled action.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff.
ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant.

[Endorsement]: Epifanio Guerrero, Plaintiff, vs. Phelps Dodge Corporation, a Corporation, Defendant. Praecipe. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [177]

In the United States District Court for the District of Arizona.

L.—219.

EPIFANIO GUERRERO,
Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,
Defendant.

Order Enlarging Time to and Including November 2, 1920, to File Record and Docket Case With Clerk of the Circuit Court of Appeals.

On consideration of the application of C. R. McFall, Clerk of the United States District Court for the District of Arizona, and good cause appearing therefor,—

It is ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is extended and enlarged to and including the 2d day of November, 1920.

Dated at Tucson, Arizona, this 28th day of September, 1920.

WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

[Endorsement]: Filed September 28, 1920. C. R. McFall, Clerk. By J. Lee Baker, Chief Deputy Clerk. [178]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of

the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Epifanio Guerrero, Plaintiff, versus Phelps Dodge Corporation, a Corporation, Defendant, said case being number Law 219—Tucson on the docket of said court.

I further certify that the foregoing 179 pages, numbered from 1 to 179, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed to said transcript the original writ of error, the original assignment of errors and the original citation issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Fifty-four & 80/100 Dollars ($54.80/100), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court this 22d day of October, 1920.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona. [179]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Assignment of Errors (Original).

Comes now the above-named defendant and makes and files this, its assignment of errors, upon which it will rely on the prosecution of its writ of error to review the judgment herein rendered on the 14th day of May, 1920.

I.

The Court erred in sustaining plaintiff's objection to defendant's cross-examination of plaintiff, and excluding the answers elicited by such examination, by which defendant proposed to show that the plaintiff's left eye was not in the condition plaintiff testified that it was, and that plaintiff did not state such to be its condition when his left eye was examined by the defendant's witness, Dr. H. W. Rice; that any communication made [180] by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician, was not with reference to any physical or supposed physical disease of plaintiff. For this purpose, the

defendant propounded the following question and the following discussion ensued:

Q. Did you tell Doctor Rice that you could not see in that eye when you went to him?

Mr. KEARNEY.—I object to that question as privileged.

The COURT.—Objection sustained on the ground it is a privileged communication, and it cannot be called for if the plaintiff objects to it.

Mr. MATHEWS.—This is not the time I expected to reach the question, your Honor, but perhaps it may as well be presented now as any other time. The plaintiff in this case, on the examination of his own counsel, has already voluntarily described not only his acts in going to Doctor Rice, but the treatment Doctor Rice administered to him. It has been given in this testimony, on account of some water he says Doctor Rice put in his eye, being too strong. He says the doctor at Morenci, and afterwards identifies him as Doctor Rice. The record will show that he has testified voluntarily in answer to questions by his own counsel, not only that Doctor Rice treated him, but what the treatment consisted of; that he put water in his eyes that was too strong. While I recognize the rule that your Honor refers to, we submit that the door has been opened by counsel.

The COURT.—Well, frankly, I have the same views on the subject. In view of the fact that the evidence was called for by plaintiff's

counsel, and I [181] must confess that I don't know at this time whether calling for that evidence opens the door to your cross-examination as to verbal statements made or not. It would seem that if the plaintiff calls for a part of what took place, that the defendant might be entitled to know all that took place. If the plaintiff had not told anything about the treatment that he received, or the fact that he was treated at all, but may have testified as to the injury, and then called physicians and had them testify as to the result of the injury, that would be a different proposition, but they elected to go further than that, and to testify to the treatment, as to the character of the treatment that he received. It is an unusual situation, and it is an entirely new question, but I prefer, under the circumstances, to permit you gentlemen to look into the question and see whether or not you can find any authorities on the subject, and I will permit you to recall this witness for the purpose of again propounding that question to him, in the event it is held by the Court to be admissible, notwithstanding the fact that in the meantime they may have finished their testimony and closed their case.

Mr. MATHEWS.—For the present, the objection is sustained?

The COURT.—Yes.

Mr. MATHEWS.—May the record show our exception, your Honor?

The COURT.—Yes.

II.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. W. Rice, and excluding such testimony [182] offered by defendant by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor H. W. Rice, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor H. W. Rice, and the plaintiff. For the purpose of eliciting this testimony, defendant propounded the following question and the following discussion ensued:

Q. When he first came to you on that afternoon in the latter part of January, 1919, complaining of the eye injury, when you first examined him, what did you find?

Mr. KEARNEY.—We object, it is a privileged communication.

Mr. DUNSEATH.—Privileged communication.

Mr. MATHEWS.—We have the same question that was presented a moment ago. I presume we will be permitted to present any authorities we may have in regard to the matter? [183]

The COURT.—Yes, the plaintiff has permitted you without objection to go this far.

Mr. DUNSEATH.—I believe the only question was about seeing him and making an examination.

The COURT.—No, he has gone into the fact that he has treated him.

Mr. KEARNEY.—He does not testify to any treatment.

Mr. MATHEWS.—I would suggest that we do not think this question is objectionable. It refers, not to an oral communication made by the plaintiff, but to something which the doctor himself found in the course of his examination and treatment, about which examination and treatment the plaintiff himself has testified voluntarily, going to the extent of telling in part what that treatment consisted of, and actually complaining before the jury of what the doctor did, criticising and finding fault with him, and we contend clearly that under that state of the record that plaintiff himself has swept away his privilege and opened the door to us to have the doctor give the whole

thing rather than be confined to the one-sided statement of the plaintiff.

The COURT.—There is no doubt about this being a privileged communication, and the only question is whether you have or have not yourselves opened the door for the introduction of that testimony by going as far as you have in the examination of the plaintiff, and also in allowing, without objection, the examination of this witness up to the time when they called for the actual oral conversation between them.

Mr. DUNSEATH.—The examination of this doctor has not proceeded to any extent whatsoever that it becomes a waiver of the privilege. We could [184] not consistently.

Discussion.

The COURT.—I will sustain the objection for the present.

Mr. MATHEWS.—We will ask the record to show our exception.

The COURT.—You may have an exception.

III.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness, Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way

affected or impaired by such accident; that any communication made by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, [185] the defendant propounded the following question and the following discussion ensued:

Q. What sort of an examination did you put the plaintiff through?

Mr. DUNSEATH.—We object to the question on the ground it is privileged.

The COURT.—Objection sustained.

Mr. MATHEWS.—I would like to be heard on that.

The COURT.—All right, I will withdraw the rule and allow you to be heard.

Mr. MATHEWS.—The point here is a new question, so far as I know, and it has not been raised previously in any other case in this court. We have here a situation where the relation of patient and physician within the meaning of the statute, does and did not exist. The situation is exactly similar to that which would exist where a prospective employee comes to a prospective employer and under the rule submits himself to a physical examination to enable the prospective employer to know whether he is physically fit to work; that that

is the sole purpose of the examination. Not being that of medical treatment, but to secure information for the employer for his use in determining this very fact. That is frequently the case, and I recall one instance at least where such testimony was permitted in this court, the testimony of a physical examination, upon application for employment. The theory of it is that there is no relation of physician and patient in the ordinary sense. But the situation is one where a person who is examined voluntarily submits himself to a physician in order to enable the third person to know something of the condition which he otherwise would not be able to ascertain for himself. We have here precisely the same sort of [186] situation. The purpose may be a different purpose, but the situation, so far as I can see any legal distinction, is similar. We have here a man who has been an employee and has received or claimed to have received an injury, and he is negotiating with his employer seeking some sort of a settlement, and the employer desires to know what the true condition of that man is for his own information and guidance in making a settlement or refusing such a settlement, and that purpose if fully explained to the employee, the person supposed to be injured, and the arrangement has been made by mutual consent between the employee and the employer whereby a physician may be used, and that with the understanding that the in-

formation obtained by the physician shall be communicated to the employer; made known to him for the very purpose of possible settlement, or possible negotiations. Now, if there is any element of confidence to that, it does not occur to me. It is not the relation of patient and physician any more than he was able to go to some other place and have this examination made. Suppose he went to some physical director or some atheletic trainer and said, "I want you to measure me for such and such a thing; I want you to determine certain things about my body, and my size, etc., because another man wants it, and I want him to have it, and I am willing that he should have it." There would be absolutely no relation of physician and patient as ordinarily understood. It just happens in this case that the person who is able to get this information, and who both parties desire to go and get the information is a physician. His ability depends upon the fact that he has expert medical knowledge, and the testimony of Mr. Hodgson, coupled with the testimony already given by Dr. Gray shows absolutely no relation of physician and patient existed in this case. The privilege [187] never existed, and it could not have been intended to have existed. I think that the privilege is waived, if one ever existed, when I say, "All right, I will go to a doctor and let him examine my eye or anything else about me; I will let him examine me with reference to an injury

or supposed injury for the purpose of enabling you to know those things about me which you are now not thoroughly satisfied about." Now, if there is going to be a question of privilege raised, certainly I waive that privilege when I give that consent. I think the true theory of it was that the relation of patient and physician never existed. There was no understanding that there was to be any treatment in this case. As to the other physician, Doctor Martin, Mr. Hodgson testified he sent him there for examination and possible treatment. Not so here in this case. It was solely a matter of obtaining information about this man. He might have said, "No, I will not submit to it. I will let you find out the best way you can," but he says, "All right, I will go." He did not take advantage of that. He says, "If you will pay the expenses, arrange for some doctor specialist in this line, give me the money to go down there, I will go and submit myself so that you may have the information which you have not now, and then perhaps we will be able to arrive at some settlement or something. You will have the facts more to your satisfaction." I can't see that the confidential relation or possible privilege could grow out of that.

The COURT.—I think the Court should know whether there was such a relation at the time, and I suppose that it would only be fair to the defendant for the plaintiff to testify as

to his understanding, whether he did so agree before ruling on that. [188]

Mr. KEARNEY.—Shall we put the plaintiff on the stand and examine him a little bit?

The COURT.—I think so.

EPIFANIO GUERRERO, being recalled by counsel for the plaintiff, by permission of the Court, and having been heretofore duly sworn, through the interpreter, testified as follows:

Direct Examination by Mr. KEARNEY.

Q. When you went to El Paso, what did you understand you were going there for? Did you understand that you were going there to have your eye treated?

Mr. MATHEWS.—Your Honor, we object to that.

The COURT.—The first part of the question is perfectly proper, I think, but the latter part of it is objectionable. His understanding of what he was going there for is proper.

Q. What did you understand you were being sent to El Paso for?

A. To benefit my eye; it would do my eye some good.

Q. Did you believe when you went there that you were to receive treatment for your eye, or try to better your eye or not?

A. Yes, sir, with that intention.

Q. You went there for the purpose of receiving some benefit to your eye?

A. Yes, sir, most assuredly. How would I be in this fix?

Q. Did you pay hospital fees when you worked for the company? A. Yes, sir.

Q. And that goes to help keep up the hospital by the doctors there?

The COURT.—I want to know if there was any understanding between this witness and any officer of the company [189] at the time he left.

Mr. KEARNEY.—He says now, to get a better eye.

The COURT.—You may cross-examine him, if you so desire.

Cross-examination by Mr. MATHEWS.

Q. You only stayed in El Paso one day, I believe you testified?

A. The day that I left, the doctor sent me to El Paso, and I got there at two-forty and I went to the doctor right away, and I left there the next day.

Q. They did nothing to you but examine you, did they?

A. That is all.

Q. You came back as soon as he examined you, did you?

A. Yes, sir, sure, I was going down on some business.

Mr. MATHEWS.—No further cross-examination.

Redirect Examination by Mr. KEARNEY.

Q. Did you believe that the doctor that you saw at El Paso was acting with the doctors at Morenci?

Mr. MATHEWS.—That is objected to on the ground it is irrelevant. What this man believed since, founded upon some unreasonable ground, is not competent. He may believe anything. The true situation here is whether or not this arrangement that Mr. Hodgson has sworn to occurred here. That has not been contradicted so far by anybody.

The COURT.—I will ask him myself.

Q. What, if any, conversation did you have with Mr. Hodgson, the gentleman who just testified here, with reference to your going to El Paso? A. Nothing. [190]

Q. Did, or did he not request—did you not request of him or the company a settlement for the injury to your eye?

A. Yes, sir.

Q. Did he or did he not tell you that if you would go to El Paso to be examined by a specialist, an eye specialist, and that specialist made a report to the effect that you had such an injury, that he would settle with you?

A. No, sir, he did not tell me anything.

Q. Did you have any conversation with him to the effect that you would go down there and be examined, have your eye examined by the El Paso specialist and that if that surgeon should be permitted to make report to him as to the condition in which he found your eye?

A. No, sir, I have never been to El Paso after that.

Q. After what?

The INTERPRETER.—I will ask that question again.

The COURT.—All right.

The WITNESS.—No, sir.

Q. Was it your purpose, and the purpose of the company's officer to obtain a report from the specialist in El Paso in order to enable him to determine whether or not he would settle with you for the injury to your eye?

A. Of the company, do you mean?

Q. Yes.

A. He only examined my eye, but he never told me anything.

Q. Was it agreed between you and Mr. Hodgson before you left Morenci that you should go down to El Paso and have your eyes examined and that that specialist should make a report to him, and if the report showed an injury, that he would settle with you for the injury? [191]

A. No, sir, he didn't tell me nothing.

Witness excused.

The COURT.—Well, the evidence in that matter being evenly balanced, I feel that I ought to sustain the objection.

Mr. MATHEWS.—This is a little unusual, your Honor. I take it that this testimony that the plaintiff has given at this point is positively rebuttal. It is not a part of his main case.

The COURT.—No, it is preliminary, to enable the Court to determine whether or not this testimony should be admitted, or whether it should be excluded because it is privileged.

Mr. MATHEWS.—I understand perfectly what it is for, but that is the way in which these things should come. The plaintiff puts in his case, and at least, the defendant has made a *prima facie* case, or showing here, and a very strong one, that a certain state of facts existed which would take this case entirely out of the privileged communications. Now, in rebuttal —it does not matter when it happened—the plaintiff is permitted out of order, to meet that *prima facie* showing and endeavor to overcome it.

The COURT.—Only for the purpose of enabling the Court to determine whether the doctors' evidence is privileged.

Mr. MATHEWS.—The plaintiff testified that he never knew that such a man as Hodgson existed, and naturally he would say he never had any such a conversation with him, but when we make this showing, we are entitled to put the testimony in on the face of this *prima facie* showing, and then if the plaintiff wants to attack this *prima facie* showing, he does it on rebuttal, and then after the showing is presented, the [192] whole thing, under proper instructions, goes to the jury. But to say that while the *prima facie* showing that we have made here, and then right in the middle of the trial allow the plaintiff to come in and attack that, without letting us go through with our testimony, and then say because the testimony is conflicting, and in the opinion of the Court

evenly balanced, that the rule should be made against the defendant, and the defendant will not be permitted to put the testimony in at all, seems to me rather hard.

The COURT.—Maybe you are right.

Mr. MATHEWS.—It strikes me. I don't want to bring in something here for the purpose of making an error, but it strikes me—it seems to me clear that it is like many, many other situations where *prima facie* showing are to be made first. That does not mean that it is final. It may be overcome later by the rebuttal, but if we make a *prima facie* showing, and put this in proper form, and then like anything else, or other situations, it is simply a matter for the jury, under the proper instructions from the Court what to do with this, in case they believe such and such a thing, and disregard it if they do not believe such and such a thing, and not a matter to be finally determined by the Court in its finding.

The COURT.—You object to it?

Mr. KEARNEY.—I object to it on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—We ask that our exception be entered.

The COURT.—You may have an exception. [193]

The Court erred in said ruling in holding:

(a) That the matter sought to be elicited was privileged.

(b) That the relation of physician and patient existed between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(c) That the burden of proving that such relation did not exist was on the defendant.

(d) In changing the order of proof and holding that the examination of plaintiff as to the relation between the plaintiff and the defendant's witness, Dr. J. B. Gray, was a part of plaintiff's case in chief and not rebuttal.

(e) In passing on a question of fact and taking it from the jury.

(f) In weighing the evidence and determining the credibility of witnesses.

(g) In holding the evidence to be evenly balanced on the question presented.

(h) In excluding the testimony offered after holding that the evidence was evenly balanced.

(i) In excluding the evidence offered after defendant had made a *prima facie* showing that the relation of physician and patient did not in fact exist between the defendant's witness, Dr. J. B. Gray, and the plaintiff.

(j) In holding the question presented to be one of admissibility or competency and not [194] of weight or credibility.

(k) In, in effect, depriving defendant of its entire defense by changing the order of proof and placing the burden of proof on defendant.

IV.

The Court erred in sustaining the plaintiff's objection to the testimony of the defendant's witness,

Doctor J. B. Gray, and excluding such testimony offered by defendant, by which defendant proposed to show that the plaintiff's left eye was not injured as the plaintiff testified, was not in the condition described by plaintiff in his testimony; that plaintiff, in fact, had sustained no injury to his left eye as a result of the accident described by him in his testimony; that the sight of such eye was in no way affected or impaired by such accident; that any communication by the plaintiff to the defendant's witness, Doctor J. B. Gray, or any examination made by such physician was not with reference to any physical or supposed physical disease of the plaintiff, and that the relation of physician and patient did not in fact exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff. For the purpose of eliciting this testimony, the defendant propounded the following question and the following discussioin ensued: [195]

Q. What part of the examination did you conduct, and what part did Doctor Detweiler conduct?

Mr. KEARNEY.—We object to that; it is privileged to him.

The COURT.—Sustained.

Mr. MATHEWS.—The defendant desires an exception.

The COURT.—Exception.

Q. Now, what—I will ask you this, and you need not be in a hurry to answer it, because the counsel on the other side will object. I don't want to waste time, your Honor.

The COURT.—You may ask the question.

Q. You need not be in a hurry with your reply, Doctor. Did you and Doctor Detweiler, or either of you on this occasion make a test of the plaintiff to ascertain whether or not he really was blind in his left eye?

Mr. KEARNEY.—I object to that on the ground it is privileged.

The COURT.—I sustain the objection.

Mr. MATHEWS.—The defendant excepts.

Q. Now, one more question along that line, slightly different, your Honor. Did you and Doctor Detweiler or either of you on that occasion apply the scientific tests for the purpose of ascertaining whether or not the plaintiff's left eye was normal or abnormal?

Mr. KEARNEY.—We object to that question on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception, Mr. Reporter.

Q. And on the same occasion did you also make an examination of the plaintiff's right eye? [196]

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Same ruling.

Mr. MATHEWS.—Same exception. We have no further examination. Just one more question.

Q. As a result of that whole examination made by yourself and Doctor Detweiler, did

you reach a conclusion as to the condition of the plaintiff's eyes?

Mr. KEARNEY.—I object to that on the same ground.

The COURT.—Sustained.

Mr. MATHEWS.—Exception.

V.

The Court erred in holding that the matters sought to be elicited by defendant's question, "What sort of an examination did you put the plaintiff through?" propounded to the defendant's witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered 3 herein, was privileged to the plaintiff.

VI.

The Court erred in placing the burden of proving that the relation of physician and patient did not exist between the defendant's witness, Doctor J. B. Gray, and the plaintiff, upon the defendant. [197]

VII.

The Court erred in excluding the testimony offered by defendant through its witness, Doctor J. B. Gray, as set forth in full in assignment of error numbered three herein, after holding the evidence as to the relation of physician and patient between defendant's said witness and the plaintiff to be evenly balanced.

VIII.

The Court erred in sustaining plaintiff's objection to the testimony of the defendant's witness, Doctor H. H. Starke, and excluding such testimony offered by defendant by which defendant proposed to show

that any communication made by the plaintiff to the defendant's witness, Doctor H. H. Starke, or any examination of plaintiff by such physician was not with reference to any physical or supposed physical disease of the plaintiff. For the purpose of eliciting this testimony defendant propounded the following question:

> Q. Now, I will put a question which will probably be objected to and the doctor need not answer promptly until the objection is made. What did you find as a result of that examination?
>
> Mr. KEARNEY.—Now, we object to that as privileged.
>
> The COURT.—Objection sustained on the ground it is a privileged communication. [198]
>
> Mr. MATHEWS.—Defendant excepts.

IX.

The Court erred in refusing and failing to give the following instruction to the jury, as requested by the defendant:

> Gentlemen of the jury, the law of this State permits the plaintiff in a case of this kind to object to the testimony of any physician who may have examined or treated him, as to what he told such physician about his ailments or as to what the physician himself discovered by his examination of the plaintiff. The law does not require the plaintiff to make any such objection, but leaves him free to make it or not make it, as he sees fit. If he does make the objection, the Court is required to sustain it. In this

case, the testimony of certain physicians has been offered by the defendant corporation, and has been objected to by the plaintiff, and this testimony has been excluded, not because the Court was unwilling to admit it, but simply because the plaintiff objected to it, and the Court, under the law, was required to sustain the objection. The fact that the plaintiff has made this objection, and has thereby kept these physicians from testifying, is a fact to be considered by you in weighing the plaintiff's own testimony, and in judging of the truth of the story he tells.

WHEREFORE, defendant prays that said judgment be reversed.

ELLINWOOD & ROSS,
JOHN E. SANDERS,
JAMES S. CASEY,
Attorneys for Defendant. [199]

[Endorsed]: In the District Court of the United States for the District of Arizona. Epifanio Guerrero, Plaintiff vs. Phelps Dodge Corporation, a Corporation, Defendant. Assignment of Errors. Filed Sep. 1, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [200]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judge of the District Court of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court of the United States for the District of Arizona, before you, between Epifanio Guerrero, plaintiff, and Phelps Dodge Corporation, a corporation, defendant, a manifest error hath happened, to the great damage of the said Phelps Dodge Corporation, as by its complaint appears, we, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit, [201] at San Francisco, California, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right,

and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 2d day of September, in the year of our Lord one thousand nine hundred and twenty.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that a copy of the foregoing writ of error was this day lodged in my office by Phelps Dodge Corporation, a corporation, plaintiff in error, for Epifanio Guerrero, defendant in error.

WITNESS my hand and the seal of said court, this 2d day of September, 1920.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States for the District of Arizona. [202]

[Endorsed]: In the District Court of the United States for the District of Arizona. Epifanio Guerrero, Plaintiff vs. Phelps Dodge Corporation, a Corporation, Defendant, Writ of Error. Filed Sep. 2, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona. [203]

In the District Court of the United States for the District of Arizona.

EPIFANIO GUERRERO,

Plaintiff,

vs.

PHELPS DODGE CORPORATION, a Corporation,

Defendant.

Citation on Writ of Error. (Original).

United States of America,—ss.

To Epifanio Guerrero, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein Phelps Dodge Corporation, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [204]

WITNESS the Honorable WILLIAM H. SAWTELLE, United States District Judge for the District of Arizona, this 2d day of September, 1920.

WM. H. SAWTELLE,
United States District Judge.

Service of the foregoing citation is hereby acknowledged this 8th day of September, 1920.

L. KEARNEY and
JAMES R. DUNSEATH,
Attorneys for Plaintiff.

[Endorsed]: In the District Court of the United States for the District of Arizona. Epifanio Guerrero, Plaintiff vs. Phelps Dodge Corporation, a Corporation, Defendant. Citation on Writ of Error. Filed Sep. 2. 1920. C. R. McFall, Clerk United States District Court for the District of Arizona.

[Endorsed]: No. 3591. United States Circuit Court of Appeals for the Ninth Circuit. Phelps Dodge Corporation, a Corporation, Plaintiff in Error, vs. Epifanio Guerrero, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed October 25, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.